

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

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| L.S., Appellant |) | |
| |) | |
| and |) | Docket No. 08-1462 |
| |) | Issued: September 25, 2009 |
| U.S. POSTAL SERVICE, POST OFFICE, Belen, NM, Employer |) | |
| |) | |

Appearances:
Katherine Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 23, 2008 appellant filed a timely appeal from the October 9, 2007 merit decision of the Office of Workers' Compensation Programs which denied her claim for compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.¹

ISSUE

The issue is whether appellant established that she was disabled from December 8, 2001 to December 20, 2004 due to the accepted exacerbation of her preexisting cervical disc disease.

FACTUAL HISTORY

On August 27, 2002 appellant, then a 39-year-old automated markup clerk, filed an occupational disease claim alleging that repetitive work duties caused her cervical disc disease. She first realized her condition was caused by her employment on September 11, 2001. Appellant did not stop work. The Office accepted the claim for an exacerbation of preexisting

¹ On appeal, appellant does not seek the Board's review of a December 12, 2007 decision denying her request for a hearing.

cervical disc disease. In a statement dated September 6, 2002, Williams Gibbs, an employing establishment manager, noted that appellant worked six hours per day, five days per week at the time she filed her claim. This claim was developed as claim file number xxxxxx666.

The record reveals that, on December 19, 1997, appellant filed an occupational disease claim for left shoulder and neck pain. It was accepted by the Office for a left ulnar nerve lesion, claim file number xxxxxx184.² In a June 29, 2001 decision, the Office terminated appellant's compensation benefits on the grounds that her work-related condition had resolved. Appellant did not exercise her appeal rights from the June 29, 2001 decision.

On July 3, 2001 appellant contacted the employing establishment and requested a light-duty position. She submitted reports from Dr. Marie-Anne Denayer, a Board-certified neurologist, who noted that appellant could work eight hours daily within restrictions. On September 27, 2001 the employing establishment offered appellant a limited-duty position for four hours per day. The job offer stated, "This job offer is conditional on work being available within your restrictions/limitations and in no ways obligates the [USPS] United States Postal Service to provide you with [eight] hours work a day." After consulting with her union, appellant accepted this position and began work four hours a day from September 27 to December 7, 2001, then her hours were increased to six hours a day within her restrictions. She worked in this position prior to her August 27, 2009 occupational disease claim.

Appellant submitted several claims for compensation (Form CA-7), claiming partial disability, 10 hours per week or 2 hours per day, from September 27, 2001 to January 10, 2003. The employer submitted several CA-7a forms, time analysis, dated September 27, 2001 to January 10, 2003.

Appellant submitted treatment notes from Dr. Michael R. Grey, a Board-certified orthopedist, dated July 2 to October 24, 2002, who treated her for radicular cervical neck pain that began on September 11, 2001 and was exacerbated by her duties as a markup clerk. Dr. Grey noted that appellant had been out of work for two and a half years without improvement in her condition and returned to work for six hours a day with restrictions. Appellant also sought treatment on January 2, 2003 from Dr. John D. Meyer, a Board-certified internist, for an ongoing trapezius strain producing brachial plexus neuritis. Dr. Meyer continued her work restrictions.

On February 24, 2003 the Office requested that appellant submit medical evidence establishing her partial disability from November 16, 2002 to January 10, 2003.

In a September 11, 2001 report, Dr. Grey treated appellant for left arm pain, numbness and neck soreness with radiation to the shoulder blade and upper arm. He noted that she had not worked for two and a half years. Dr. Grey diagnosed possible thoracic outlet syndrome or brachial plexopathy. In an August 20, 2002 report, he diagnosed underlying cervical degenerative disc disease with radiculopathy, which was exacerbated by her clerk duties. Dr. Grey advised that appellant continue working four to six hours a day within restrictions. On February 27, 2003 Dr. Meyer diagnosed cervical radiculopathy and advised that her condition was caused by repetitive lifting at work. He noted that appellant was partially disabled since

² This case was consolidated with the current claim before the Board.

September 11, 2001 and recommended that she continue working six hours a day with reduced lifting.

On April 16, 2003 the Office requested that appellant submit medical evidence addressing her partial disability for work from September 11, 2001 to January 10, 2003. At the time of her most recent claim, appellant was working six hours a day. The Office requested that she address why she sought compensation as a 40-hour per week employee when her job was for 30 hours per week.

On April 24, 2003 appellant responded that she had a full-time job since 1994. In 1999, she filed a claim for left ulnar nerve lesion, which was accepted and she was disabled until 2001, claim file number xxxxxx184. Appellant noted that her compensation was terminated in May 2001. On September 27, 2001 she accepted a light-duty position for four hours a day which on December 7, 2001 was increased to six hours a day within her restrictions. Appellant contended that she was entitled to the two hours of compensation a day because Dr. Denayer returned her to work full time in January 2001 under her prior claim for left ulnar nerve lesion. She submitted medical reports from Dr. Meyer dated April 10 and June 5, 2003, who treated appellant for neck and shoulder pain and continued her restrictions of modified duty, six hours a day.

Appellant submitted several claims for compensation for partial disability, two hours a day through January 9, 2004. On October 23, 2003 Dr. Michelle Van Nieuwenhuiz, a Board-certified internist, treated appellant in follow-up for neck, shoulder pain, left lateral epicondylitis and tendinitis. Appellant continued her prior work restrictions with lifting limited to 25 pounds.

From August 21 to December 18, 2003, Dr. Meyer treated appellant for increasing neck pain and diagnosed recurrent trapezius spasm with cervical radiculopathy and continued her six-hour-a-day work restriction.

In a January 26, 2004 decision, the Office denied appellant's claim for compensation for partial disability beginning December 8, 2001. It found that she had no compensable wage loss based on her 30-hour-a-week position.

On February 15, 2004 appellant requested an oral hearing which was held on August 11, 2004. She submitted excerpts from an employee and labor relations manual and other personnel records of her employment from January 15 to October 28, 2004, Dr. Meyer treated her for cervical radiculopathy and left hand extensor overuse. Dr. Meyer reiterated her restrictions of six hours. Appellant also submitted CA-7 forms claiming partial disability compensation from January 10 to December 10, 2004.

On December 20, 2004 an Office hearing representative affirmed the January 26, 2004 decision finding that appellant did not establish compensable wage loss from December 8, 2001 to December 20, 2004.

On November 7, 2005 appellant requested reconsideration. She submitted reports from Dr. Meyer dated January 27 to September 8, 2005, who summarized Dr. Grey's treatment and opined that there was no substantial and permanent improvement in her condition. Appellant submitted a seniority roster and a statement from Paul Petrucci, a union representative, who

noted that appellant was a full-time clerk since February 4, 1995 and was not currently working full time because of restrictions due her work injury.

In a decision dated February 23, 2006, the Office denied modification of the December 20, 2004 decision.

In reports dated March 30 to June 22, 2006, Dr. Meyer noted that appellant sustained a recurrence of injury and was totally disabled.³ He diagnosed cervical radiculopathy with paraspinal muscle spasm. Dr. Meyer opined that appellant's job duties including repetitive lifting and sorting of mail was directly responsible for the current findings.

Appellant appealed her case to the Board. In a June 15, 2007 order, the Board remanded the case to the Office to combine her case files.⁴

By decision dated October 9, 2007, the Office denied modification of the prior Office decision.

LEGAL PRECEDENT

A claimant has the burden of proving by a preponderance of the evidence that he or she is disabled for work as a result of an accepted employment injury and submit medical evidence for each period of disability claimed.⁵ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.⁶ The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.⁷

Under the Federal Employees' Compensation Act, the term disability means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury.⁸ The general test of disability is whether an injury-related impairment prevents the employee from engaging in the kind of work she was doing when injured.⁹ 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.¹⁰ However, if an employee no longer has an impairment,

³ On October 7, 2005 appellant filed a claim for a recurrence of disability beginning October 1, 2005. This matter is not before the Board on the present appeal.

⁴ Docket No. 07-627 (issued June 15, 2007).

⁵ See *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁶ *Id.*

⁷ See *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁸ *Carl R. Benavidez*, 56 ECAB 596 (2005); *Paul E. Thams*, 56 ECAB 503 (2005); *Sean O'Connell*, 56 ECAB 195 (2004).

⁹ *Elmer R. Poland*, 39 ECAB 1367 (1988); see *David H. Goss*, 32 ECAB 24 (1980).

¹⁰ See *Allison M. McCauley*, 31 ECAB 1076 (1980).

which prevents her from performing the duties of the job she held when injured, she is no longer disabled.¹¹

The Board will not require the Office to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation. For each period of disability claimed, the employee has the burden of establishing that he or she was disabled for work as a result of the accepted employment injury.¹²

ANALYSIS

The Office accepted appellant's claim for exacerbation of preexisting cervical disc disease. On June 29, 2001 it terminated her compensation benefits based on her accepted left ulnar lesion claim after finding that the condition had resolved. On September 27, 2001 appellant accepted a light-duty position for four hours a day, which was increased to six hours a day on December 8, 2001. The employing establishment noted that it was not obligated to offer her work for eight hours a day. On August 27, 2002 appellant filed the present claim for exacerbation of her cervical disease. She was working six hours per day pursuant to the September 27, 2001 job offer. Therefore, any disability related to the August 27, 2002 cervical condition would be for 6 hours a day or 30 hours a week, as appellant's position did not provide for 40 hours of work a week. Under the Act, the term disability means the incapacity due to a work-related injury to earn the wages that the employee was receiving at the time of injury.¹³

The medical evidence of record supports that appellant was able to work six hours a day within her restrictions from December 8, 2001 to December 20, 2004. The evidence from the employing establishment establishes that she typically worked six hours a day during this period.

Reports from Dr. Grey noted appellant's status and, for the period at issue, indicated that she could work up to six hours daily within restrictions. He did not support that her accepted exacerbation of preexisting cervical disc disease precluded her from working six hours daily, within restrictions, for any particular dates during the period December 8, 2001 to December 20, 2004. Therefore, these reports are insufficient to establish that appellant had compensable wage loss.

Dr. Meyer treated appellant for trapezius spasm with cervical radiculopathy. He opined that she could work six hours per day within restriction for the period at issue. Dr. Meyer's reports do not specifically address whether appellant was unable to work six hours per day from December 8, 2001 to December 10, 2004 causally related to her accepted employment injury. His reports do not support that her accepted exacerbation of preexisting cervical disc disease precluded her from working two hours daily during the period December 8, 2001 to December 20, 2004. Dr. Meyer's reports are insufficient to discharge appellant's burden of proof.

¹¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

¹² *Sandra D. Pruitt*, 57 ECAB 126 (2005).

¹³ *See Janice J. Green*, 49 ECAB 307 (1998).

Appellant has not established that she was disabled for work for two hours a day job as a result of the accepted employment injury.

On appeal, appellant asserts that her position of record at the time of injury and when disability began was full time. Although she accepted a part-time position she did not forfeit her right to full-time compensation. However, as noted, the term disability means incapacity due to a work-related injury that prevents appellant from earning the wages she was receiving when injured. The record reveals that on August 27, 2002 appellant was working six hours a day pursuant to the September 27, 2001 job offer. On September 6, 2002 a manager noted appellant's part-time work schedule of 30 hours a week. Appellant further argues that in July 2001 her employer refused to provide light-duty work because of restrictions due to her subsequently accepted of August 27, 2002. However, the record reveals that, at the time appellant requested light-duty work in July 2001, her work restrictions from Dr. Denayer did not relate the restrictions to any claim for a new occupational disease. There is no evidence in the record supporting that the employer refused to provide appellant light-duty work due to her accepted exacerbation of preexisting cervical disc disease.

CONCLUSION

The Board finds that appellant has failed to establish that she has any compensable disability from December 8, 2001 to December 20, 2004.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 9, 2007 is affirmed.

Issued: September 25, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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