

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

A.M., Appellant

and

**U.S. POSTAL SERVICE, SHUBUTA POST
OFFICE, Shubuta, MS, Employer**

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**Docket No. 09-1495
Issued: April 26, 2010**

Appearances:

*Timothy J. Matusheski, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 7, 2009 appellant, through her representative, filed a timely appeal from a February 12, 2009 merit decision of the Office of Workers' Compensation Programs denying her claims for a recurrence of disability and a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether appellant established that she sustained a recurrence of disability on or after May 24, 2007 causally related to her July 15, 2006 employment injury; and (2) whether appellant established that she sustained a permanent impairment to a scheduled member entitling her to a schedule award.

FACTUAL HISTORY

On July 15, 2006 appellant, then a 29-year-old rural carrier, was involved in a motor vehicle accident while working. She stopped working that day and began receiving continuation of pay. The Office accepted the claim for multiple contusions of the trunk, traumatic brain

hemorrhage with open wound, loss of consciousness, pulmonary insufficiency following trauma, contusions to the face, scalp and neck, closed injury to the lumbar vertebra without spinal cord injury and subacute delirium following closed brain injury.

On September 12, 2006 appellant's treating physician, Dr. Joshua A. Maski, a Board-certified neurologist, released her to light duty with work restrictions. On September 13, 2006 the employing establishment offered appellant a part-time, limited-duty position as a modified rural carrier.¹ Appellant returned to work on September 15, 2006. On November 7, 2006 the employing establishment offered her another part-time, limited-duty position as a modified rural carrier, which she accepted on November 13, 2006. The record reveals that appellant stopped working on May 24, 2007.

In letters dated August 23, 2007 through January 28, 2008, the employing establishment advised appellant that she did not submit acceptable medical documentation or other evidence to explain her absence from scheduled duty since May 25, 2007. It subsequently placed her on suspension and notified her of a proposed March 7, 2008 removal.

In a November 20, 2007 medical note, Dr. Bertha J. Blanchard stated that appellant was not able to work secondary to severe frontal lobe damage from work. In a November 27, 2007 medical note, she opined that appellant could never return to work as a postal carrier.

Appellant subsequently submitted a claim for wage-loss compensation (Form CA-7) from July 15, 2006 for "up to six months from July 15, 2006."

In an April 8, 2008 medical report, Dr. Michael C. Molleston, a Board-certified neurological surgeon, reviewed appellant's medical history. Neurological examination revealed a mild Hoffman's sign but was otherwise near normal. Appellant had intact reflexes in the upper and lower extremities and good strength throughout. Her pupils reacted normally and her visual fields were full to confrontation. Appellant's facial grimace was symmetric and her tongue protruded midline. Dr. Molleston stated that she had the usual sequelae of a closed head injury and stated that it was difficult to make an estimation of whether or not she could return to work. He opined that appellant had not reached maximum medical improvement and that she could benefit from further psychiatric therapy or evaluation by a head program. However, Dr. Molleston noted that no further treatments or medications were necessary from a neurosurgery perspective. He diagnosed intracranial injury with concussion and opined that the condition was due to the July 2006 work-related motor vehicle accident. Dr. Molleston further opined that appellant was totally and permanently disabled due to her brain injury and loss of ability to concentrate or to reliably accept responsibility.

By letter dated May 1, 2008, the Office notified appellant of the deficiencies of her claim for compensation and requested that she provide additional evidence to establish that she was disabled for work on or after July 15, 2006 due to her employment injury.

On May 15, 2008 appellant filed a claim for a schedule award CA-7 form.

¹ Appellant's date-of-injury position was also a part-time position.

By decision dated June 3, 2008, the Office denied appellant's claim for wage-loss compensation after May 24, 2007 on the grounds that she did not submit sufficient evidence to establish that she became totally disabled due to her employment injury. It noted that she did not have any wage-loss compensation prior to May 24, 2007, as she was employed in a light-duty position. The Office further denied appellant's claim for a schedule award on the grounds that she did not submit any medical evidence documenting a permanent impairment to a scheduled member.

On June 17, 2008 appellant, through her representative, filed a request for an oral hearing before an Office hearing representative. In a November 11, 2008 letter, appellant's representative contended that she was totally disabled and also submitted a claim form for wage-loss compensation dated January 25, 2008 for the period May 24, 2007 through January 25, 2008.

In an undated medical report, Dr. David Williamson, a clinical neuropsychologist, briefly reviewed appellant's medical history. A neuropsychological evaluation revealed cognitive impairments ranging from mild to severe. Appellant reported a significantly impaired prospective memory and significantly impaired organizational skills. Dr. Williamson found that she had emotional difficulties marked by long-term issues with anger management, impulsivity and poor decision. He diagnosed intracranial injury, by history and sequelae of intracranial injury. Dr. Williamson opined that appellant had an atypical neuropsychological profile and that the specific deficits on neuropsychological testing were consistent with day-to-day problems, including difficulty with organizational tasks, problems with recollection, notably worse restlessness and impulsivity combined with a quick and intense temper. He stated that appellant's deficits could be disabling socially and in the workplace. Dr. Williamson maintained that skills, such as the ability to pick up fine details, the ability to be flexible when the demands of a task suddenly change and the ability to control one's emotions, were important to the independent productive performance in many occupations and all of these factors were significantly more challenging to appellant. He stated that, while appellant was prone to some impulsivity prior to her injury, she and her father reported a worsening of her ability to inhibit inappropriate behaviors and reactions.

In an April 30, 2008 medical report, Dr. Jan P. Boggs, a Board-certified clinical neurophysiologist, described appellant's medical history and performed a full mental status examination. Test results revealed some organic movement, however, Dr. Boggs stated that she did not observe any sequelae such as fine or gross motor unsteadiness. Appellant faltered on the mental control portion of the test, but she improved slightly on the associative tasks and was fully oriented with an adequate store of personal and current information. Dr. Boggs diagnosed manic-type bipolar disorder, obsessive-compulsive features and alcohol and cannabis abuse, as well as head trauma and hip and back pain. She stated that appellant had a combination of psychological problems involving mood and compulsion and opined that she could not marshal her thoughts sufficiently to sustain job-related tasks. Dr. Boggs noted that relating to others on the job could also pose a problem. She recommended psychiatric intervention, including psychotherapy.

A telephonic hearing before an Office hearing representative took place on December 9, 2008. Appellant testified that she stopped working in May 2007. She stated that

she was told by her supervisors that her job was going to be terminated and moved to Memphis, Tennessee but that she did not receive anything in writing to this effect. Appellant further testified that she was not ordered to stop working and that if she had reported to work on her scheduled day, the employing establishment would have found work for her to perform.

By decision dated February 12, 2009, the Office hearing representative affirmed the denial of appellant's claim for a recurrence of disability after May 24, 2007 on the grounds that she did not show a change in the nature and extent of her light-duty job or a change in the nature and extent of her employment-related condition. It further affirmed the denial of appellant's claim for a schedule award on the grounds that the brain is not a scheduled member and there was no medical evidence showing that she sustained a permanent impairment of an extremity.

LEGAL PRECEDENT -- ISSUE 1

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 has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."² A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that an employee furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.³ Where no such rationale is present, medical evidence is of diminished probative value.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 to establish 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 employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.⁵ To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.⁶

² R.S., 58 ECAB 362 (2007); 20 C.F.R. § 10.5(x).

³ I.J., 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

⁴ See *Ronald C. Hand*, 49 ECAB 113 (1957); *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

⁵ *Albert C. Brown*, 52 ECAB 152, 154-155 (2000); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

⁶ *Mary A. Ceglia*, 55 ECAB 626, 629 (2004); *Maurissa Mack* 50 ECAB 498, 503 (1999).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained multiple contusions of the trunk, traumatic brain hemorrhage with open wound, loss of consciousness, pulmonary insufficiency following trauma, contusions to the face, scalp and neck, closed injury to the lumbar vertebra without spinal cord injury and subacute delirium following closed brain injury due to the July 15, 2006 employment-related motor vehicle accident. Appellant returned to part-time, light duty from September 26, 2006 through May 24, 2007. The issue is whether she established that she sustained a recurrence of disability on or after May 24, 2007.⁷ Appellant must show that she experienced either a change in her light-duty requirements or a change in her employment-related condition, which totally disabled her from performing her light-duty position.⁸

The record does not establish that the employing establishment changed appellant's light-duty requirements or withdrew her light-duty position. At appellant's telephonic hearing before an Office hearing representative, she testified that she stopped work on May 24, 2007 because she was informed by her supervisors that her position was terminated and moved to Memphis, Tennessee. This statement, however, is not supported by the record. By letters dated August 23, 2007 through January 28, 2008, the employing establishment notified appellant that she was absent from scheduled duty without sufficient explanation since May 25, 2007. Moreover, appellant admitted during the telephonic hearing that she did not have any documents in writing to show that her position was terminated and that if she had continued reporting for work, the employing establishment would have found work for her to perform.

As the Board finds that appellant did not establish that she experienced a change in the nature and extent of her light-duty position, in order to establish her claim, she must show that she experienced a change in the nature and extent of her employment-related injury, which totally disabled her from working her light-duty position.⁹

In medical notes dated November 20 and 27, 2007, Dr. Blanchard stated that appellant could never return to work as a postal carrier due to severe frontal lobe damage from work.

⁷ The Board notes that, on appeal, appellant's representative contends that appellant was totally disabled since the July 15, 2006 employment injury. This contention is not supported by the record. In general, the term "disability" under the Act means "incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury." Disability is not synonymous with physical impairment, which may or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she was receiving at the time of injury, has no disability as that term is used under the Act and is not entitled to compensation for loss of wage-earning capacity. In the instant case, appellant is entitled to compensation for total disability if she was unable to perform the light-duty position assigned by the employing establishment upon her return to work or if the employing establishment was unable to assign a limited-duty position in accordance with her doctor's specifications. Appellant was released to light duty on September 12, 2006 and returned to work on September 15, 2006. Although she may have had a physical impairment, she was not totally disabled at this time under the definition of the Act as she had the capacity to earn the wages she was receiving at the time of injury. Thus, the issue on appeal is whether she was disabled after May 24, 2007, when she stopped working her light-duty position. See 20 C.F.R. § 10.5(f); *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

⁸ See *C.S.*, 60 ECAB ____ (Docket No. 08-2218, issued August 7, 2009); *Terry R. Hedman*, *supra* note 5.

⁹ See *id.*

These notes are insufficient to establish appellant's claim as the physician did not provide a rationalized explanation explaining how appellant's severe frontal lobe damage permanently prevented her from returning to work.¹⁰ Further, Dr. Blanchard did not address appellant's work history or how her condition had changed, such that she was unable to work her light-duty position.¹¹

Further, in an April 8, 2008 medical report, Dr. Molleston diagnosed intracranial injury with concussion and opined that the condition was due to appellant's July 2006 work-related motor vehicle accident. He stated that she demonstrated the usual sequelae of a closed head injury and that it was difficult to make an estimation of whether she was able to return to work. Nevertheless, Dr. Molleston opined that appellant was totally and permanently disabled due to her brain injury and loss of ability to concentrate or reliably accept responsibility. He did not include any findings to support his conclusion that she was unable to concentrate or reliably accept responsibility. Rather, other than noting a mild Hoffman's sign, Dr. Molleston reported that appellant's neurological examination was near normal. He did not describe any significant cognitive deficiencies which would prevent appellant from concentrating or accepting responsibility.¹² Moreover, Dr. Molleston did not discuss appellant's occupational history or why she was now disabled after working for several months. Thus, his medical report is insufficient to establish her claim.¹³

In an undated report, Dr. Williamson described a neuropsychological evaluation revealing mild-to-severe cognitive impairments. He also reported that appellant had emotional difficulties and a history of substance abuse. Dr. Williamson diagnosed intracranial injury, by history and sequelae of intracranial injury. He stated that appellant had an atypical neuropsychological profile and that her specific deficits were consistent with day-to-day problems, including difficulty with organizational tasks, problems with recollection, notable restlessness and impulsivity combined with a quick and intense temper. Dr. Williamson opined that appellant's deficits could be disabling socially and in the workplace. He further stated that skills, such as the ability to pick up fine details, ability to be flexible with changing demands and the ability to control emotions, were important in many occupations and that these skills were significantly more challenging to her. Dr. Williamson also opined that appellant was prone to some impulsivity prior to her injury, however, she and her father reported an increased inability to inhibit inappropriate behaviors and reactions after her head injury.

Although Dr. Williamson opined that appellant's cognitive deficits could be challenging and disabling in the workplace, he did not provide an affirmative opinion that she was totally disabled from working light duty.¹⁴ Further, he did not provide an opinion that her disabling emotional and cognitive deficits were due to her employment injury. Rather, Dr. Williamson

¹⁰ See *Donald T. Pippin*, 54 ECAB 631 (2003).

¹¹ See *Richard A. Niedert*, 57 ECAB 474 (2006).

¹² See *S.F.*, 59 ECAB ____ (Docket No. 07-2287, issued May 16, 2008).

¹³ See *Richard A. Niedert*, *supra* note 11.

¹⁴ See *Conard Hightower*, 54 ECAB 796 (2003).

reported appellant and her father's opinion that after her injury she had an increased inability to stop inappropriate behaviors. As causal relationship is a medical issue, her belief that her employment injury caused or aggravated her condition is insufficient to establish causal relationship.¹⁵ Dr. Williamson did not provide a rationalized medical opinion that appellant was totally disabled from working due to the July 15, 2006 motor vehicle accident. Thus, his report is of diminished probative value and insufficient to establish appellant's claim.¹⁶

Finally, in an April 30, 2008 medical report, Dr. Boggs diagnosed manic-type bipolar disorder, obsessive-compulsive features, alcohol and cannabis abuse, head trauma and hip and back pain. Tests results revealed some organic movement and appellant faltered on mental control tasks. Dr. Boggs opined that, due to appellant's psychological problems involving mood and compulsion, she could not marshal her thoughts sufficiently to sustain job-related tasks. She also noted that relating to others on the job could pose a problem for appellant. The Board finds Dr. Boggs' medical report is similarly insufficient to establish appellant's claim. Dr. Boggs did not provide a fully rationalized medical opinion explaining how her employment injuries from the July 15, 2006 accident caused her psychological problems and disabled her from working light duty on May 24, 2007. Moreover, she specifically stated that she did not observe any sequelae of appellant's head injury. Further, Dr. Boggs did not address appellant's return to light duty on September 15, 2006 or why, after working for several months, she was disabled and unable to return to her position.¹⁷

Appellant did not establish that she experienced a change in the nature and extent of her work-related condition or a change in the nature and extent of her light-duty requirements. Therefore, the Board finds that she did not establish that she experienced a May 24, 2007 recurrence of disability causally related to her July 15, 2006 employment injury.

On appeal, appellant's representative contends that the Office improperly terminated appellant's compensation due to her refusal to accept suitable work. The Office, in decisions dated June 3, 2008 and February 12, 2009 did not deny appellant's claim or terminate compensation on the grounds that she refused to accept suitable work. Rather, it properly adjudicated the claim on the grounds that she did not establish a recurrence of disability. After her injury, appellant returned to light duty from September 15, 2006 through May 24, 2007. She accepted the position without complaining that the light-duty requirements were outside her work restrictions and worked for over eight months before stopping. Appellant did not present any evidence that the light-duty position was not suitable or outside her work restrictions. Therefore, she has the burden of proof to establish that she was totally disabled from working her light-duty position after May 24, 2007.¹⁸ Thus, the Board finds that appellant's argument on appeal is inapplicable to the instant issue.

¹⁵ See *S.F.*, *supra* note 12.

¹⁶ See *Theresa C. Andrews*, 55 ECAB 719 (2004).

¹⁷ See *Richard A. Niedert*, *supra* note 11.

¹⁸ See *Albert C. Brown*, *supra* note 5.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Federal Employees' Compensation Act sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.¹⁹ The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice under the law, good administrative practice requires the use of uniform standards applicable to all claimants. The implementing regulations have adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) as the appropriate standard for evaluating schedule losses.²⁰ Office procedures direct the use of the fifth edition of the A.M.A., *Guides*, issued in 2001, for all decisions made after February 1, 2001.²¹

No schedule award is payable for a member, function or organ of the body that is not specified in the Act or in the implementing regulations.²² The Act's list of scheduled members includes the eye, arm, hand, fingers, leg, foot and toes.²³ The Act also specifically provides for compensation for loss of hearing and loss of vision.²⁴ Section 8107(c)(22) of the Act vests the Secretary of Labor with the authority to expand the list of scheduled members to include "any other important external or internal organ of the body..."²⁵ In accordance with the authority granted under section 8107(c)(22), the Secretary added the breast, kidney, larynx, lung, penis, testicle, ovary, uterus and tongue to the list of scheduled members.²⁶ Neither the Act nor the regulations authorize payment of a schedule award for loss of cognitive function.²⁷ Further, the brain is not included in the list of scheduled members under the Act and regulations.²⁸

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained multiple contusions of the trunk, traumatic brain hemorrhage with open wound, loss of consciousness, pulmonary insufficiency following trauma, contusion to the face, scalp and neck, closed injury to the lumbar vertebra without spinal

¹⁹ 5 U.S.C. § 8107(a), (c).

²⁰ 20 C.F.R. § 10.404 (1999).

²¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 (June 2003); FECA Bulletin No. 01-05 (issued January 29, 2001).

²² *Henry B. Floyd, III*, 52 ECAB 220, 222 (2001).

²³ 5 U.S.C. § 8107(c).

²⁴ *Id.*

²⁵ 5 U.S.C. § 8107(c)(22).

²⁶ 20 C.F.R. § 10.404(a).

²⁷ 5 U.S.C. § 8107(c); *id.*

²⁸ *Brent A. Barnes*, 56 ECAB 336 (2005).

cord injury and subacute delirium following closed brain injury. As discussed above, the brain is not included among the list of scheduled members under the Act and regulations. As such, appellant cannot be compensated for any cognitive deficit.²⁹ She did not submit any medical evidence establishing that her accepted injuries caused a permanent impairment to any scheduled members, such as the lower and upper extremities.³⁰ To the contrary, in the April 8, 2008 medical report, Dr. Molleston reported that appellant had intact reflexes in her upper and lower extremities and good strength throughout. Accordingly, the Office properly denied her claim for a schedule award.

CONCLUSION

The Board finds that appellant did not establish that she sustained a recurrence of disability on May 24, 2007 causally related to her July 15, 2006 employment injury. The Board also finds that she did not establish that she sustained a permanent impairment to a scheduled member entitling her to a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the February 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 26, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

²⁹ See *id.*; *R.Y.*, Docket No. 07-2145 (issued April 18, 2008).

³⁰ See *Brent A. Barnes*, *supra* note 28.