United States Department of Labor
Employees' Compensation Appeals Board

A.M., Appellant	)	
	)	**Docket No. 09-1895**
and	)	**Issued: April 23, 2010**
	)	
U.S. POSTAL SERVICE, POST OFFICE, Mojave, CA, 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 July 20, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 28, 2009. Pursuant to 20 C.F.R. §§ 501.2 and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant is entitled to compensation for the period March 3 through 6, 2009.

FACTUAL HISTORY

On May 15, 2000 appellant, then a 37-year-old distribution clerk, filed a traumatic injury claim alleging that she developed a left shoulder injury while lifting and throwing in the performance of duty. The Office accepted her claim for left rotator cuff tendinitis and cervical strain. Appellant filed a recurrence of disability claim on November 1, 2003, noting that she worked at modified duty since May 22, 2000. The Office accepted this recurrence of disability on February 18, 2004 and approved cervical surgery. Appellant underwent an anterior cervical discectomy on March 25, 2004.

In a letter dated April 13, 2004, the Office noted that appellant did not work on a full-time basis. The employing establishment advised that appellant averaged 38.80 hours a week. Appellant responded on April 26, 2004, stating that she was hired on August 2, 1997 as a part-time flexible window/distribution clerk. She worked eight hours a day, 40 hours a week in this position.

Appellant returned to work limited duty four hours a day on January 3, 2005. She requested a schedule award on September 25, 2006. In a September 7, 2007 decision, the Office denied appellant's schedule award claim.

On December 12, 2007 appellant's attending physician, Dr. Lytton A. Williams, a Board-certified orthopedic surgeon, released appellant to return to modified duty with no lifting, pulling or pushing over 15 pounds and no continuous overhead work over 6 hours. His subsequent reports reiterated these restrictions.

On January 21, 2009 appellant notified the Office that since 2005 she was unable to apply or obtain full-time regular-duty jobs because of her work injury. She stated that the employing establishment had reduced her work hours to 32 hours a week. The employing establishment stated that appellant's work hours were reduced due to a declining work flow and budget.

On January 16, 2009 the employing establishment offered appellant a modified limited-duty assignment working from 11:00 a.m. to 7:50 p.m., which she accepted. On February 6, 2009 she filed a claim for compensation and alleged that beginning that day she worked six hours a day. On the reverse of the form, the employing establishment stated that appellant was not guaranteed eight hours a day as she was a part-time flexible employee, and that all similarly situated employees had a reduction in hours.

On February 6, 2009 appellant stated that her hours were cut on February 6, 2009 and that she was not allowed to work 40 hours a week because she was a part-time flexible employee. Since her injury she had been passed by in seniority for full-time regular status and was not allowed to attain full-time regular employee status due to her injury. Appellant stated that she customarily worked more than 40 hours a week, but that the hours of all part-time flexible employees were reduced to 38 hours. She noted that her physician had approved work for 40 hours a week and requested compensation for the hours she did not work.

On February 10, 2009 the employing establishment stated that the weekly hours of all part-time flexible clerks were reduced to 38. The employing establishment noted that, as of February 23, 2009, part-time flexible clerks would be reduced to 25 hours a week.

On February 26, 2009 appellant filed a claim for compensation for eight hours of leave without pay on February 22, 2009. By letter dated February 27, 2009, the Office requested additional evidence regarding her reduction in hours. It allowed 30 days for a response.

Appellant filed a claim for compensation on March 2, 2009 requesting two hours of wage loss a day from February 24 to 27, 2009. On March 10, 2009 she requested eight hours of compensation for March 7, 2009. Appellant requested two hours a day of compensation from March 3 through 6, 2009. By letter dated March 25, 2009, the Office allowed her 30 days to submit the evidence establishing her disability for the claimed hours. Appellant responded that had she not been injured, she would have become a full-time regular employee entitled to full-

time pay. On May 12, 2009 she stated that the employing establishment had not provided her with any work for two weeks.

In a letter dated May 15, 2009, the employing establishment informed appellant that it was unable to locate any position available within her medical restrictions.

By decision dated May 28, 2009, the Office denied appellant's claim for compensation from March 3 through 6, 2009 on the grounds that she did not submit sufficient evidence to establish that if not for her injury she would have received full-time regular employment.

LEGAL PRECEDENT

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.[1]

The Office's definition of 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 which caused the illness. The term also means an inability to work that takes place 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.[2] The Board has held that when a claimant stops work for reasons unrelated to the accepted employment injury, there is no disability within the meaning of the Federal Employees' Compensation Act.[3]

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."[4] This meaning, for brevity, is expressed as "disability for work."[5]

Appellant, for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury caused an employee to be

[1] *Joseph D. Duncan*, 54 ECAB 471, 472 (2003); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).

[2] 20 C.F.R. § 10.5(x).

[3] *Hubert Jones*, 57 ECAB 467 (2006); *John I. Echols*, 53 ECAB 481 (2002); *John W. Normand*, 39 ECAB 1378 (1988).

[4] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[5] *Id.*

disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.[6]

ANALYSIS

Appellant has not alleged that she could not perform the duties of her light-duty position. Rather, appellant alleged that the reduction in her hours to less than 40 hours per week in 2009 was due to the employing establishment's reduction of hours for part-time flexible employees. The record supports that for the period in question the employing establishment reduced the hours of all part-time flexible employees. The evidence of record does not establish that the employing establishment had taken any formal action to cause any change in the nature and extent of appellant's light-duty job requirements.[7]

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or 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. When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, the employee is entitled to compensation for any loss of wage-earning capacity resulting from the employment injury.[8]

The record reveals that appellant was employed as a part-time distribution/window clerk as of the date of her injury. Appellant is not claiming that the reduction in her hours was due to her disability to perform her employment duties. The reason for the reduction in appellant's hours to less than 40 hours per week in 2009 was due to the employing establishment's reduction of hours for all part-time flexible employees. As the reduction of appellant's hours was unrelated to her injury, the Board finds that the Office properly determined that appellant failed to meet the definition of disability and was not entitled to wage-loss compensation from March 3 through 6, 2009.

Appellant also alleged that but for her employment injury she would have been promoted to a full-time regular clerk based on her seniority and would have been guaranteed 40 hours a week in this position. The Board has repeatedly held that the probability that an employee, if not for her injury-related condition, might have had greater earnings does not afford a basis for payment of compensation under the Act.[9] The terms of the Act are specific as to the method and amount of payment of compensation; neither the Office nor the Board has the authority to, enlarge upon the terms of the Act, nor to make an award of benefits under any terms other than

[6] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[7] *Kaaumoana*, *supra* note 4.

[8] *Id.*

[9] *William A. Archer*, 55 ECAB 674 (2004) (the Board found that, although appellant, an "as needed" employee argued that his employment injury had cost him a regular-duty position, this was irrelevant to the determination of his weekly pay rate).

those specified in the statute.[10] The Board finds that unless appellant's contentions are in keeping with the scope or intent of the Act, *i.e.,* unless the statute authorizes payment of the kind demanded by appellant, the Office's denial of such demands must be affirmed.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she is entitled to compensation benefits for the period March 3 to 6, 2009.

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 23, 2010
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

[10] *Leona B. Jacobs*, 55 ECAB 753 (2004).