

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

I.M., Appellant and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, San Jose, CA, Employer)))))))))))	Docket No. 09-2087 Issued: May 11, 2010
---	---	--

<i>Appearances:</i> <i>Appellant, pro se</i> <i>Office of Solicitor, for the Director</i>	<i>Case Submitted on the Record</i>
---	-------------------------------------

DECISION AND ORDER

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

JURISDICTION

On August 7, 2009 appellant filed a timely appeal from an August 7, 2008 merit decision of the Office of Workers' Compensation Programs. 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 the Office met its burden of proof to terminate compensation for wage loss effective August 8, 2008.

FACTUAL HISTORY

On December 5, 2002 appellant, then a 38-year-old tax examiner, filed an occupational disease claim (Form CA-2) alleging a right arm injury causally related to her federal employment. The Office accepted that appellant sustained right lateral epicondylitis, right carpal tunnel syndrome, right trigger finger and right styloid tenosynovitis.

Appellant's work history is not entirely clear from the record. An August 13, 2005 nurse's report indicates that appellant was working in a modified position at that time. The nurse noted that appellant's work restrictions included 30 minutes of keyboard activities every hour, not to exceed four hours, restrictions on use of the right elbow and wrist, with a 10-pound lifting restriction. A February 22, 2006 nurse's report stated that appellant had stopped working on September 9, 2005. The nurse reported on October 24, 2006 that an employing establishment supervisor "called to say she only had repetitive work at the [employing establishment]. She was unsure [appellant] wanted to work and had not tried to come to work in a year." The report also stated that appellant had "stopped working" on July 20, 2006, when she underwent a right trigger finger release.

The record indicates that on November 9, 2006 appellant's employment was terminated based on misconduct. On March 22, 2007 appellant underwent right elbow surgery and she began receiving compensation for temporary total disability.

In a report dated March 5, 2008, Dr. Donald Pang, an attending orthopedic surgeon, provided results on examination. He diagnosed right elbow lateral epicondylitis, right de Quervain's release, right trigger thumb release and right hand carpal tunnel release. Dr. Pang noted that appellant continued to complain of discomfort to the right elbow, wrist and forearm. He completed a work restriction evaluation (Form OWCP-5c) indicating appellant had permanent work restrictions. Dr. Pang advised that appellant should not type more than 15 minutes a hour, 2 to 4 hours of repetitive wrist or elbow movements, and a three-pound lifting restriction. He also reported appellant could sit, walk or stand for eight hours per day.

In a letter dated June 16, 2008, the Office requested that the employing establishment comment on the work restriction evaluation. It noted that appellant had been terminated for cause but inquired as to whether "in the hypothetical case that she had not been so terminated -- would you now have modified duty for the clamant within the restrictions that Dr. Pang outlines in his report?" In a June 19, 2008 response, a human relations specialist stated, "Based on my experience with requesting light duty job offers from the agency, these restrictions would have been accommodated if the employee was not terminated."

By letter dated July 2, 2008, the Office advised appellant that it proposed to terminate her wage-loss compensation. It found the employing establishment had modified work within her work restrictions and her removal for cause was not a basis for continuing compensation payments. Appellant was advised to submit evidence or argument within 30 days. She did not respond.

In an August 7, 2008 decision, the Office terminated compensation for wage loss effective August 7, 2008.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability

causally related to her employment, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.¹

ANALYSIS

The Office terminated compensation on the grounds that the employment-related disability had ceased as of August 7, 2008. The term “disability” as used under the Federal Employees’ Compensation Act means the incapacity, because of injury in employment, to earn the wages, which the employee was receiving at the time of injury.² The Board notes that the Office did not make any finding on whether the medical evidence established that appellant could perform the modified position she previously performed. It appeared that appellant had been working a modified position in 2005 but when she stopped working it is not clear that she ever returned to work. There are references to appellant’s “stopping” work in 2006 but a nurse reported that an employing establishment supervisor stated on October 24, 2006 that appellant had not worked for over a year. In any case, the Office did not make adequate findings regarding the modified job or establish that it was within appellant’s work restrictions, as stated by Dr. Pang.

The Board further notes the Office did not attempt to terminate compensation based on a refusal of suitable work pursuant to 5 U.S.C § 8106(c)(2). This would require a written offer from the employing establishment and specific procedures as outlined by the Board.³

In this case, there was no job offer to appellant from the employing establishment. The Office apparently made a determination that appellant had the ability to earn the wages she was earning at the time of injury, relying on a statement from an employing establishment human resources specialist that, based on her experience, the restrictions would have been accommodated. While it is acknowledged that the employing establishment was not in a position to make a job offer to an employee who had been terminated for cause, the evidence is not sufficient to establish that appellant had the ability to earn the wages she was earning at the time of injury. The evidence from the employing establishment is brief and generalized in nature. It is not clear what specific job would have been available, what duties the job would entail, the wages of the position or other information relevant to her capacity for work. There must be sufficient detail regarding an available job for the Office to properly make a determination that appellant had the ability to earn the wages she was earning at the time of injury. The evidence of record is not sufficient to establish that appellant’s disability ceased in this case. The Board finds that the Office did not meet its burden of proof.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate compensation for wage loss effective August 7, 2008.

¹ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

² *Donald Johnson*, 44 ECAB 540, 548 (1993); 20 C.F.R. § 10.5(17).

³ *See Mary E. Woodard*, 57 ECAB 211 (2005).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 7, 2008 is reversed.

Issued: May 11, 2010
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