

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

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D.H., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
DURHAM VETERANS MEDICAL CENTER, )  
Durham, NC, Employer )

**Docket No. 11-846  
Issued: December 14, 2011**

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
ALEC J. KOROMILAS, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On February 15, 2011 appellant, through her attorney, filed a timely appeal from the Office of Workers' Compensation Programs (OWCP) decision dated December 3, 2010 which denied his claim for compensation. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUE**

The issue is whether appellant met her burden of proof to establish that she sustained disability from July 27, 2007 to December 3, 2010 causally related to her accepted employment condition.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

## **FACTUAL HISTORY**

On July 30, 2007 appellant, then a 48-year-old temporary medical technician, filed a claim for traumatic injury indicating that on July 24, 2007, while lifting boxes, she injured her back. OWCP accepted her claim for a lumbar sprain/strain and an aggravation of lumbar disc disease with radiculopathy at L3-4 with lumbar spinal stenosis at L3-4. Appellant stopped work on July 30, 2007 and was terminated from her position for cause on August 10, 2007, specifically for failing to follow medical center policies.

Appellant was treated by a nurse practitioner on July 20 and 26, 2007, for low back pain and radiculopathy. In a July 30, 2007 duty status report, the nurse diagnosed strain of the low back and advised that appellant was totally disabled from work. In a return to work slip dated July 30, 2007, appellant was returned to work on August 6, 2007. In an attending physician's report dated August 8, 2007, the nurse noted a history of injury and diagnosed low back pain with radiculitis. She noted with a check mark "yes" that appellant's condition was caused or aggravated by her work duties and that appellant would be disabled from July 30 to August 14, 2007. On August 14, 2007 appellant was treated by Dr. Michael Zilles, a Board-certified orthopedic surgeon, who diagnosed lumbar degenerative disc disease and referred her for physical therapy. Dr. Zilles noted that she would be out of work for the next week.

In correspondence dated August 9, 2007, the employing establishment noted that appellant returned to work on July 30, 2007 and continuation of pay was authorized from July 30 to August 5, 2007. The employing establishment advised that she was a temporary employee and her employment expiration date was August 21, 2007 as noted on the SF-50 notice of personnel action dated August 20, 2006. The employing establishment stated that appellant was terminated effective August 10, 2007 and that her continuation of pay should not exceed August 10, 2007. An October 23, 2007 OWCP supplemental roll payment worksheet and periodic disability worksheet reflect that she was placed on the periodic rolls on August 11, 2007 and received compensation with dependents payable at a rate of 75 percent for a net compensation of \$1,343.62 every 28 days. In correspondence dated October 25, 2007, it advised appellant that she was being placed on the periodic rolls and would be paid compensation every 28 days.

On December 3, 2009 appellant filed a Form CA-2a, notice of recurrence of disability. In a letter dated December 31, 2009, OWCP requested additional information in support of her claim for a recurrence of disability. It noted that appellant was on the periodic rolls.

On October 17, 2010 appellant filed a (Form CA-7), claim for compensation, for total disability for the period July 27, 2007 to October 17, 2010. The employing establishment noted that she was terminated from employment on August 10, 2007 for cause unrelated to her work injury.

In a letter dated October 27, 2010, appellant indicated that she did not report back to work on August 14, 2007 and did not have a job or wages to report. She noted that she was not working or receiving compensation. Appellant noted that she was injured on July 24, 2007 and had not worked since July 27, 2007.

In a letter dated October 29, 2010, OWCP noted receipt of appellant's Form CA-7, claim for compensation. It advised that she was eligible for continuation of pay from July 27 to August 11, 2007 and had been on the periodic rolls and paid compensation for wage loss every 28 days since August 11, 2007. OWCP noted that during the claimed period of disability appellant had received wage-loss compensation and continuation of pay and requested she explain why she sought for additional compensation for the period July 27 to August 10, 2007. It also requested that the employing establishment provide documentation showing what compensation was afforded to appellant during the period July 27 to August 10, 2007.

In an August 21, 2007 memorandum from the employing establishment human resources department it was noted that appellant received continuation of pay from July 30 to August 10, 2007. On November 9, 2010 the employing establishment noted that her timecards for the period July 27 to August 10, 2007 reflected that she worked her regular tour of duty on July 27, 2007, from 6:00 a.m. to 2:30 p.m. and July 28 and 29, 2007, were regular days off. From July 30 to August 10, 2007 appellant was authorized continuation of pay to cover her absence. She was terminated on August 10, 2007 for reasons unrelated to her work injury. The employing establishment noted that on July 23, 2007 appellant was given notice that her temporary position was being terminated and on July 30, 2007 she filed a traumatic injury claim alleging that she sustained a work injury on July 24, 2007.

In a decision dated December 3, 2010, OWCP denied appellant's claim for compensation for total disability from July 27 to December 3, 2007 on the grounds that she had received wage-loss compensation and continuation of pay. It noted that timecards for the period in question revealed she had worked her regular tour on July 27, 2007, from 6:00 a.m. to 2:30 p.m., that July 28 and 29, 2007 were her regular days off. Appellant received continuation of pay from July 30 to August 10, 2007. OWCP determined that she was paid either regular pay, continuation of pay or compensation for wage loss for the entire period July 27, 2007 to December 3, 2010 and failed to support eligibility for any additional wage-loss compensation.

### **LEGAL PRECEDENT**

FECA provides that a claimant is entitled to compensation for disability resulting from a personal injury sustained while in the performance of duty.<sup>2</sup> The term "disability" as used under FECA means the incapacity, because of injury in employment, to earn the wages which the employee was receiving at the time of injury.<sup>3</sup>

Section 8118<sup>4</sup> of FECA provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to traumatic injury

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<sup>2</sup> 5 U.S.C. § 8102(a).

<sup>3</sup> *Donald Johnson*, 44 ECAB 540, 548 (1993); *D.M.*, Docket No. 08-1600 (issued July 13, 2009); 20 C.F.R. § 10.5(17).

<sup>4</sup> 5 U.S.C. § 8118.

with his immediate supervisor on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title.”<sup>5</sup>

### **ANALYSIS**

OWCP accepted appellant’s claim for lumbar sprain and strain, aggravation of lumbar disc disease with radiculopathy at L3-4 and lumbar spinal stenosis at L3-4. On December 3, 2010 it denied her claim for compensation for total disability on the grounds that the evidence did not establish that she was entitled to any additional wage-loss compensation from July 27, 2007 to December 3, 2010. Appellant asserts that she was injured on July 24, 2007 and had not worked since July 27, 2007 and did not receive compensation.

The Board notes that compensation for wage loss is paid for disability, which is defined as the inability to earn the wages earned at the time of injury. The actual earnings, whether classified as overtime or other type of pay, are relevant factors in determining the amount of compensation owed. OWCP offsets compensation based on the actual earnings in accord with its implementing regulations and Board precedent.<sup>6</sup> The employing establishment noted that timecards for appellant revealed that on July 27, 2007 she worked her regular tour of duty from 6:00 a.m. to 2:30 p.m. and her regular days off were July 28 and 29, 2007. The employing establishment noted that from July 30 to August 10, 2007 she was granted continuation of pay to cover her absence. The record further revealed that in an October 23, 2007 OWCP supplemental roll payment worksheet and periodic disability worksheet, appellant was placed on the periodic rolls on August 11, 2007 and was currently receiving compensation with dependents payable at a rate of 75 percent for a net compensation of \$1,343.62 every 28 days. The record confirms that for the period July 27, 2007 to December 3, 2010 she was paid either regular pay, continuation of pay or compensation for wage loss during the entire period claimed. Consequently, the Board finds that appellant is not entitled to any additional wage-loss compensation on those dates she worked eight hours, was paid continuation of pay or received wage-loss compensation for her accepted conditions.

### **CONCLUSION**

The Board finds that appellant was not entitled to additional disability compensation for the period July 27, 2007 to December 3, 2010.

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<sup>5</sup> Section 8122(a)(2) provides that written notice of injury was to be given as specified in section 8119, which provides for a 30-day time limitation for filing a claim of a traumatic injury. 5 U.S.C. § 8119(a), (c), 8122(a)(2). See also *Carol A. Lyles*, 57 ECAB 265 (2005).

<sup>6</sup> See *Donna M. Rowan*, 54 ECAB 698 (2003); *Albert C. Shadrick*, 5 ECAB 376 (1953); 20 C.F.R. § 10.403; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated December 3, 2010 is affirmed.

Issued: December 14, 2011  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

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