United States Department of Labor
Employees' Compensation Appeals Board

S.C., Appellant	)	
and	)	**Docket No. 10-460**
	)	**Issued: January 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Memphis, TN, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case submitted on the record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 8, 2009 appellant filed a timely appeal from the September 4, 2009 merit decision of the Office of Workers' Compensation Programs denying wage-loss compensation and continuation of pay. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish that she was disabled as of December 9, 2006; and (2) whether appellant was entitled to continuation of pay.

FACTUAL HISTORY

On February 6, 2007 appellant, then a 40-year-old professional specialist trainee, experienced difficulty breathing and an asthma attack in the performance of duty on November 16, 2006. There was construction being performed in the building which caused her to have difficulty breathing. The employing establishment had no knowledge of an injury in

North Carolina. Appellant stopped work on November 16, 2006 and returned to work on December 4, 2006.[1]

In a January 12, 2007 report, Dr. Paul R. Deaton, a Board-certified internist, advised that appellant could return to work away from dust or chemicals.

In an April 2, 2007 report, Dr. Deaton, noted that appellant was hospitalized on November 17, 2006 due to an exacerbation of her asthma secondary to exposure to construction dust at the employing establishment. He advised that she was discharged on November 20, 2006.

In an April 17, 2007 decision, the Office denied appellant's claim for compensation as the evidence was not sufficient to establish that the incident occurred as alleged.

In a letter dated June 15, 2007, appellant enclosed a letter from her manager at the employing establishment to support that construction was being done at the building during the time of her exposure.

In a June 7, 2007 letter, Bruce Evans, an employing establishment manager, noted that appellant was employed in Greensboro, North Carolina as a professional specialist trainee from April 1 through December 9, 2006. Appellant was reassigned to her former duty station in Memphis, Tennessee, pursuant to her request, because of an ongoing health condition. Mr. Evans explained that she had worked in a temporary higher-level assignment as an EAS employee in Human Resources when she asked to return to her former position. Appellant was reassigned as a "FTR PS-5 Clerk" effective December 9, 2006. After her assignment was effective, she contacted her manager and notified her that she did not accept the reassignment to the lower position and requested that she be allowed to return to her position in Greensboro.

In a letter dated August 3, 2007, the Office notified appellant that she had several claims for asthma. Regarding her claim number xxxxxx563, it was open for medical coverage and she should submit her inquiries regarding her pay rate to that claim. The Office informed appellant that her cases would be combined.

Appellant requested a hearing that was held on October 25, 2007. At the hearing, she testified that she received a promotion and reported to work in North Carolina on May 15, 2006. Appellant had her first asthma attack on September 28, 2006. On November 16, 2006 construction was being performed in the building next to her workstation. Appellant alleged that she was exposed to dust and particles that caused breathing difficulty and she was hospitalized on November 17, 2006. She was subsequently told to report to the Tennessee district and that she would not be "taking my level in my salary, that they were going to just send me back until they finished" with the construction. Appellant advised a human resources manager, Nancy James, on November 20, 2006 that her physician restricted her from working around construction dust. She alleged that Ms. James advised her that she could go back to the district until she could get everything under control. Appellant asserted that, on November 21, 2006, she

[1] The record reflects that appellant has a prior claim for asthma, which was accepted in April 1996 under claim number xxxxxx563.

received a telephone call and was told to report to the Memphis office. She was not told that she would be demoted or reassigned to the clerk level position or she would have returned to the Greensboro position. Appellant sought workers' compensation to cover the wage loss caused by her demotion.

In a January 8, 2008 decision, an Office hearing representative accepted appellant's claim for exacerbation of asthma. He found that she was entitled to wage-loss compensation for her hospitalization effective November 17, 2006; but she was not entitled to wage-loss compensation due to her reassignment effective December 9, 2006.

On January 11, 2008 the Office accepted appellant's claim for temporary aggravation of asthma.[2]

On June 23, 2008 appellant requested reconsideration. She alleged that she could not return to the position that she held in Greensboro, North Carolina, because of permanent work restrictions that included being unable to work in or around construction. Appellant alleged that she was never given a downgrade and never requested to be changed to a lower level. She denied that she requested being placed in a lower level position. Appellant provided a December 15, 2006 treatment note from Dr. Deaton, who placed her off work from November 16 to December 4, 2006 and advised that she could not be around dust or construction sites.

Appellant provided two notification of personnel action forms. An April 1, 2006 notice pertained to her promotion as a professional specialist trainee in Greensboro, North Carolina. The second form contained an effective date of December 9, 2006 and noted that appellant accepted a position as a mail-processing clerk in Memphis, Tennessee. The report contained an annotation that the "action effected at employee's request" and "voluntary request for reassignment to Tennessee district per letter dated November 30, 2006 signed by acting manager human resources."

In a December 11, 2006 e-mail, Ms. James, the manager in Greensboro, North Carolina, addressed the reassignment. Appellant inquired into returning to Tennessee and being placed back in the clerk position. Ms. James noted that the employing establishment was under no obligation to offer her a higher position than the one that she was offered. She advised appellant that it was her understanding that appellant requested a return back to Memphis, to her former position.

In a September 18, 2008 decision, the Office denied modification of its prior decision. It noted that appellant requested a return to the Tennessee district. The Office found that the position in Greensboro, North Carolina, was still available after her recovery from the injury. It found that appellant was not entitled to wage loss for the difference in pay.

On April 3, 2009 appellant requested reconsideration. She enclosed a copy of a labor relations manual and contended that she never initiated the transfer from Greensboro to

[2] In a January 11, 2008 telephone call memorandum, appellant inquired into whether she could be reimbursed for her traveling expenses from Greensboro, North Carolina, to Memphis, Tennessee, when she was hospitalized. She was advised that she would not be reimbursed as there were hospitals in Greensboro.

Memphis. Appellant alleged that there was no documentation to support such a request. She returned to Memphis to see a pulmonary specialist who knew of her condition and because it would have taken four months for her to see a pulmonary specialist in Greensboro. After appellant was discharged from the hospital, she contacted, Ms. James in Greensboro, to inform her of the restrictions. Ms. James advised appellant that the employing establishment was going to be under construction for some time and that she should stay in Tennessee until the construction was completed.

In a July 18, 2007 statement, Shirley Williford, the president of the local union, noted that she attended the mediation for appellant with her supervisors and management on February 2, 2007. She alleged that Ms. James stated that if appellant's claim was accepted, "[appellant] would have no other choice than to accept her back into that position, without having to speak with [National Associate Postal Supervisor,] [Equal Employment Opportunity] or anyone else." The Office also received copies of a printout from the employing establishment website, a copy of a March 29, 2006 professional and specialist trainee program agreement, personnel forms and information pertaining to reassignment or reemployment of employees injured on duty, a vacancy announcement for a personnel processing specialist (FRSS), professional specialist trainee.

A March 23, 2009 settlement agreement reflects that appellant settled a matter with the employing establishment, which included issues pertaining to her work assignment, moving and working conditions while at the Greensboro, location and the change in her work assignment back to her position in Memphis, Tennessee. Under terms of the agreement, she did not admit and the parties mutually agreed that the settlement did not constitute an admission of any error, fault or legal violation of any nature with respect to the subject matter of the lawsuit. In a June 1, 2009 statement, appellant indicated that the settlement agreement did not address her position or the involuntary reassignment.

By decision dated July 2, 2009, the Office denied modification of its prior decision. It found that there was no evidence to establish that the employing establishment was unable to accommodate appellant's restrictions or that the change in position was not voluntary.

On July 30, 2009 appellant requested reconsideration. In a letter dated August 2, 2009, she reiterated that there was evidence that the employing establishment was unable to accommodate her work restrictions. Appellant also enclosed copies of e-mails from Ms. James, who noted that she was pleased with appellant's performance and was sorry that appellant was uncomfortable in Greensboro. Ms. James recommended that appellant be reimbursed for her relocation expenses. She also noted that the relocation back to Memphis, Tennessee, was voluntary and no special accommodation was made.

In a July 24, 2009 report, Dr. Syed H. Shirazee, a Board-certified internist, noted that he examined appellant on June 8, 2009 for an extrinsic asthma evaluation and determined that she had a form of asthma which was triggered by several factors including dust and grass. He explained that she had a moderate obstructive abnormality, with a significant response to inhaled bronchodilators. Dr. Shirazee advised that appellant was unable to work in her current position due to the triggers (dust) that caused asthma attacks and shortness of breath. He noted that she had worked in an office setting in North Carolina that was dust free and she was able to perform

her job functions without any problems. Dr. Shirazee advised that reexposure to a work environment that contained the noted triggers could endanger appellant's life. He opined that she could work in a dust free environment, such as an office setting.

By decision dated September 4, 2009, the Office denied modification of its prior decision. It found that appellant was not entitled to continuation of pay as the claim was filed more than 30 days after the date of injury. Moreover, appellant was not entitled to compensation for the difference between her earnings as a trainer and clerk because she voluntarily left the trainee program.

LEGAL PRECEDENT -- ISSUE 1

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.[3] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues.[4] The issue of whether a particular injury causes disability for work must be resolved by competent medical evidence.[5]

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.[6] 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.[7]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish that she was totally disabled effective December 9, 2006.

The Office accepted that appellant had a work-related temporary aggravation of asthma. Appellant received compensation for wage loss effective November 17, 2006. However, the Office found that she was not entitled to compensation beginning December 9, 2006 due to her reassignment in Memphis. Appellant alleged that she returned to her former position based on the premise that she could not work at the location while the construction was being performed and requested that she receive compensation for the difference in pay between the two jobs.

Appellant submitted a January 12, 2007 report from Dr. Deaton, a treating Board-certified internist, who advised that she could return to work away from dust or chemicals. In a

[3] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[4] *Id.*

[5] *See Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

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

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

April 2, 2007 report, Dr. Deaton noted that she was hospitalized on November 17, 2006 due to an exacerbation of her asthma secondary to exposure to construction dust at the employing establishment. He advised that appellant was discharged on November 20, 2006. The Board notes that she did not claim wage-loss compensation until December 9, 2006. These reports which predate the period of disability are of limited probative value as they do not address the period at issue.

In a July 24, 2009 report, Dr. Shirazee, a Board-certified internist, explained appellant had a form of asthma which was triggered by several factors including dust and grass. He advised that she was unable to work in her current position due to the triggers (dust) that caused asthma attacks. Dr. Shirazee noted that appellant had worked in an office setting in North Carolina that was dust free and she was able to perform her job functions without any problems. He advised that reexposure to a work environment that contained the above-mentioned triggers could endanger her life. Dr. Shirazee opined that appellant was able to work in a dust free environment, such as an office setting. The Board finds that this report supports that appellant was able to work in a dust free environment, such as an office setting. However, it does not specifically address the period of disability commencing on December 9, 2006, some two years prior. The medical evidence does not support that appellant's injury-related impairment prevented her from engaging in the kind of work she was doing when injured.[8] Instead, the medical evidence generally indicates that she could work within restrictions.

The Office properly determined that appellant was not entitled to wage-loss compensation due to her reassignment to a lower level position effective December 9, 2006 as the evidence supports that the reassignment was voluntary. A notification of personnel action form, effective December 9, 2006, stated that she accepted a position as a mail processing clerk in Memphis, Tennessee, that the action was made at the "employee's request" and that the reassignment request was "voluntary." Although appellant asserted that it was not voluntary she provided no supporting evidence other than her assertions that clearly support her contention. The evidence provided by the employing establishment clearly supports that the change in jobs was voluntary. There is no evidence to support that an appropriate position would not have been available but for her voluntary acceptance of a lower paying job. Therefore, appellant's loss of wages is due to her voluntary choice in changing jobs rather than to residuals of her employment-related condition.[9]

On appeal, appellant confirmed that she volunteered to work in Memphis, Tennessee during the construction phase in Greensboro, North Carolina, because her physician placed restrictions on her from working around the construction. She denied that she voluntarily accepted a demotion or that she reported to the lower position without being instructed to by her superiors. However, evidence from the employing establishment supports that appellant voluntarily requested to return back to Memphis, to her former position. She is not entitled to wage-loss compensation.

[8] *Id.*

[9] *See Cathy Jo Fossen*, 49 ECAB 654 (1998) (appellant not entitled to wage-loss compensation as a result of a voluntary reassignment).

LEGAL PRECEDENT -- ISSUE 2

Office regulations provide, in pertinent part, that to be eligible for continuation of pay, an employee must: (1) Have a traumatic injury which is job related and the cause of the disability and/or the cause of lost time due to the need for medical examination and treatment; (2) File Form CA-1 within 30 days of the date of the injury; and (3) Begin losing time from work due to the traumatic injury within 45 days of the injury.[10] The Act authorizes continuation of pay for an employee who has filed a valid claim for a traumatic injury.[11]

ANALYSIS -- ISSUE 2

On February 26, 2007 appellant filed a claim for a November 16, 2006 traumatic injury. Because she did not file a claim within 30 days, the time specified in sections 8118(a) and 8122(a)(2) of the Act,[12] she is not entitled to continuation of pay.

Section 8122 of the Act provides that original claims for compensation for disability or death must be filed within 3 years after the injury or death unless the immediate supervisor had actual knowledge of the injury or death within 30 days or written notice of death or injury, as specified in section 8119, was given within 30 days. Actual knowledge and written notice of injury under section 8119 thereby serve to satisfy the statutory period for filing an original claim for compensation. The Office accepted the claim as timely and paid compensation.

Claims that are timely under section 8122 are not necessarily timely under section 8118(a). Section 8118(a) makes continuation of pay contingent on the filing of a written claim within 30 days of the injury. When an injured employee makes no written claim for a period of wage loss within 30 days, she is not entitled to continuation of pay, notwithstanding prompt notice of injury.

The Board notes that there are no exceptions to the time limitation for continuation of pay. In the case of *William E. Ostertag*,[13] the Board explained that the exceptional circumstances provision of section 8122(d)(3), which may excuse the untimely filing of an original claim for compensation under section 8122(a) and (b), is not applicable to section 8118(a) which concerns a claim for continuation of pay. Because the Act makes no provision for an exception to the time limitation in section 8118(a), no exceptional or mitigating circumstance, including error by the employing establishment, can entitle a claimant to continuation of pay who has not filed a written claim within 30 days of the date of injury.[14] Appellant did not submit written notice of injury on an approved form until February 26, 2007, more than 30 days after the

[10] 20 C.F.R. § 10.205(a)(1-3).

[11] 5 U.S.C. § 8118(a).

[12] *Id.*; 5 U.S.C. § 8122(a)(2).

[13] 33 ECAB 1925 (1982).

[14] *Laura L. Harrison*, 52 ECAB 515 (2002).

November 16, 2006 employment injury, when she submitted a CA-1 form. Therefore, she is not entitled to continuation of pay.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she was entitled to wage-loss compensation beginning December 9, 2006. The Board also finds that she is not entitled to continuation of pay for her November 16, 2006 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 4, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 26, 2011
Washington, DC

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

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

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