

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

K.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Gosling Springs, TX, Employer**

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**Docket No. 10-1445
Issued: March 23, 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 April 30, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated March 29, 2010 which denied her claim for wage loss. Pursuant to the Federal Employees' Compensation Act¹ 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 was disabled from February 28 to April 10, 2009 causally related to her accepted thoracic and lumbar sprains.

FACTUAL HISTORY

This is the second appeal in the present case. In a July 2, 2008 decision, the Board affirmed a September 12, 2007 Office decision. The Board found that appellant failed to establish that her disability from May 26 to August 17, 2007 was causally related to her

¹ 5 U.S.C. §§ 8101 *et seq.*

September 20, 2004 employment injury.² The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³

Appellant was treated by Dr. Benjamin Agana, a Board-certified physiatrist, from February 8 to June 19, 2008. Dr. Agana performed a right L3-L5 radiofrequency neurotomy treatment. He diagnosed chronic mechanical back pain with lumbar facet syndrome and continued appellant's work restrictions.⁴ On June 3, September 11 and October 16, 2008 appellant underwent trigger point injections and Dr. Agana diagnosed chronic back pain, degenerative disease with lumbar facet syndrome. On October 21, 2008 she complained of worsening back pain and Dr. Agana diagnosed chronic back pain, degenerative disease and lumbar facet syndrome with recent exacerbation. Dr. Agana advised that he was unsure why appellant had ongoing pain and referred her for physical therapy. His duty status reports continued her work restrictions.

Appellant was also treated by Dr. Karl K. Covington, a Board-certified anesthesiologist. In reports beginning June 3, 2008, Dr. Covington noted her status and monitored her medication for back pain. On January 16, 2009 he saw appellant for increased back pain during activities. Dr. Covington noted findings of tenderness of the mid-thoracic spine and radiculopathy and diagnosed chronic mid to low back pain. On February 10, 2009 he noted that appellant presented with mid-thoracic pain and radiculopathy and diagnosed chronic mid-low back pain. Dr. Covington stated that she was doing very well. On March 10, 2009 he related that appellant reported doing better than the previous month and advised that she was happy with her current medication regime. Dr. Covington noted findings of mid-thoracic tenderness and radiculopathy and diagnosed chronic mid-low back pain. Appellant also submitted physical therapy reports.

Appellant filed claims for wage loss on intermittent dates from February 28 to April 10, 2009. The employing establishment provided time analysis forms, noting that she requested 1.45 hours of compensation for physical therapy sessions on February 28, March 2, 4, 6, 9 and 11, 2009 and 2.15 hours for March 10, 2009. Appellant worked eight-hour days from February 28 to March 11, 2009 and no wages were lost. She requested 1.45 hours of compensation for physical therapy sessions on March 15, 18, 20, 23 and 25, 2009 and 2.15 hours for March 26, 2009. Appellant worked eight-hour days from March 15 to 26, 2009. Again, the employer noted that she sought compensation for lost wages but no wages were lost. Appellant requested 1.45 hours of compensation for a physical therapy session on March 31, 2009 and 2.15

² Appellant sustained injury while placing mail in a hamper that day. Her claim was accepted for thoracic and lumbar sprains.

³ Docket No. 07-2435 (issued July 2, 2008).

⁴ In a May 3, 2007 report, Dr. Agana advised that appellant could work full-time within certain restrictions. The employing establishment offered her a full-time modified sales, services distribution associate effective August 18, 2007, subject to Dr. Agana's restrictions with a tour of duty from 8:00 a.m. to 5:00 p.m. Appellant accepted the position and returned to work on August 18, 2007.

hours of compensation on April 7, 2009. She worked eight-hour days on March 31 and April 7, 2009. The employing establishment noted that no wages were lost.⁵

In a letter dated April 21, 2009, the Office requested that appellant submit medical evidence establishing her partial disability from February 28 to April 10, 2009 as claimed. It noted that she claimed 10.85 hours of compensation from February 28 to March 13, 2009; 9.40 hours of compensation from March 14 to 27, 2009; and 10.85 hours of compensation from March 28 to April 10, 2009, with her claiming that the time lost was during her lunch period. The Office noted that the time analysis forms established that appellant worked eight-hour days on the days that she claimed lost wages and the evidence did not reveal that she lost any work hours as claimed. It requested that she submit evidence showing lost duty hours for the periods in question.

In a May 19, 2009 statement, appellant advised that she attended physical therapy sessions on certain dates in which she worked “up to and beyond” eight hours. She was told by her supervisor to clock out when she left for her appointment because, if she ended her tour, she would not be permitted any more clock rings the rest of the day. In an October 12, 2009 statement, appellant’s attorney contended that the Office paid her under similar situations in the past. Counsel noted that her employer required her to work extra time to have eight hours of work, but she missed one hour of work for the period claimed.

Appellant submitted reports from Dr. Covington from April 7 to September 1, 2009 noting her status and diagnoses. On April 30, 2009 Dr. Agana noted that she presented with no complications in her condition. He reported findings and advised that appellant could continue working with restrictions. Dr. Agana’s subsequent reports noted her status.

In a decision dated October 26, 2009, the Office denied appellant’s claim for compensation for disability. It found that the medical evidence did not establish that she lost time from work during the dates claimed.

On November 7, 2009 appellant requested a telephonic hearing which was held on February 1, 2010. She testified that, from February 28 to April 10, 2009, she sought compensation for the time she went to physical therapy during her lunch break. Appellant would clock out for lunch and attend physical therapy and would still work a full eight-hour day. She believed that she should be compensated for overtime. Appellant submitted reports from Drs. Agana and Covington.

In a decision dated March 29, 2010, an Office hearing representative affirmed the October 26, 2009 decision.

⁵ Appellant submitted March 10 and April 7, 2009 medical office notes confirming that she was treated by Dr. Covington on those dates. She also submitted medical records confirming that she had physical therapy on February 6, March 2 through 31, 2009.

LEGAL PRECEDENT

The Act provides that a claimant is entitled to compensation for disability resulting from a personal injury sustained while in the performance of duty.⁶ The term “disability” as used under the Act means the incapacity, because of injury in employment, to earn the wages which the employee was receiving at the time of injury.⁷

ANALYSIS

The Office accepted appellant’s claim for sprains of the thoracic and lumbar regions. On October 26, 2009 it denied her claim for wage-loss compensation for partial disability on the grounds that the evidence did not establish that she lost any time from work on the dates claimed from February 28 to April 10, 2009. Appellant asserts that she is entitled to compensation from February 28 to April 10, 2009 because she attended physical therapy sessions during her lunch. Although she works eight-hour days she claims wage loss as overtime during this period.

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. The Office offsets compensation based on the actual earnings in accord with its implementing regulations and Board precedent.⁸ If appellant has earnings equal to or greater than her current pay for the date-of-injury position, she is not entitled to wage-loss compensation for that period.⁹ The employing establishment submitted CA-7a, time analysis forms which document that she worked eight-hour days from February 28 to April 10, 2009. This evidence establishes that appellant had no lost wages on the claimed dates. Appellant’s counsel acknowledged this, noting on October 12, 2009, that her employer required her to work extra time so she did have eight hours of work during the period in question.¹⁰ Consequently, the Board finds that appellant is not entitled to compensation on those dates she worked eight or more hours and had no wage loss due to her accepted conditions.

Appellant submitted numerous medical reports from Drs. Agana and Covington. Neither, physician provided an opinion that supporting that she was disabled and unable to work for any specific dates or parts of a day, during the claimed period. As noted, the factual evidence from

⁶ 5 U.S.C. § 8102(a).

⁷ *Donald Johnson*, 44 ECAB 540, 548 (1993); *D.M.*, Docket No. 08-1600 (issued July 13, 2009); 20 C.F.R. § 10.5(17).

⁸ *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).

⁹ *See D.M.*, *supra* note 7.

¹⁰ Counsel also asserted before the Office that appellant missed one hour of work during lunch for the period claimed. As noted, however, evidence from the employing establishment does not document any wage loss during the claimed period.

the employing establishment also does not show that appellant had any lost wages during this period.

CONCLUSION

The Board finds that appellant was not entitled to disability compensation for the period February 28 to April 10, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 29, 2010 is affirmed.

Issued: March 23, 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