United States Department of Labor
Employees' Compensation Appeals Board

C.M., Appellant	)	
and	)	**Docket No. 14-1381**
	)	**Issued: December 29, 2014**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, Fort Belvoir, VA, Employer	)	

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 2, 2014 appellant, through her representative, filed a timely appeal from a January 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 appellant met her burden of proof to establish a recurrence of total disability on or after November 21, 2009 due to her April 5, 2009 work injury.

FACTUAL HISTORY

On May 7, 2009 appellant, then a 71-year-old distribution process worker, filed a traumatic injury claim stating on that April 5, 2009 she sustained an injury when she attempted

[1] 5 U.S.C. §§ 8101-8193.

to move a heavy box at work. She indicated that the box broke, and when she tried to catch it she injured her lower back, and right arm. OWCP accepted appellant's claim for a lumbar sprain/strain, and right elbow lateral epicondylitis. Appellant stopped work on April 5, 2009 and received compensation on the daily rolls.

On July 28, 2009 appellant returned to limited-duty work for the employing establishment in a job that involved making labels.[2] She worked for five hours a day, five days a week and was not required to engage in lifting or pulling. Appellant was able to take breaks as necessary. The position duties and requirements were in accordance with work restrictions provided by Dr. John R. Frankeny, an attending Board-certified orthopedic surgeon.

In a November 2, 2009 report, Dr. Gerald W. Piper, a Board-certified orthopedic surgeon serving as an OWCP referral physician, noted that appellant had a low back strain with preexisting degenerative changes of the lumbar spine, as well as lateral epicondylitis of the right elbow. He stated:

> "It is my opinion that [appellant] can continue to work as a label maker. She is presently working five hours a day and I believe that she could go to 10 hours a day in the near future if her [transcutaneous electrical nerve stimulation] TENS unit is working as well as it has over the past day and if she has a cortisone injection for her lateral epicondylitis of the right elbow. It is my opinion with a reasonable degree of medical certainty that the low back strain and the right lateral epicondylitis of the elbow are related to the work injury of April 5, 2009."[3]

In a report and note dated November 9, 2009, Dr. Steven Morganstein, an attending osteopath, discussed appellant's medical condition and provided work restrictions. He found that she could lift or carry up to 20 pounds, that she could not engage in repetitive bending or twisting and that she had to alternate between sitting and standing on a frequent basis. Appellant could work up to five hours a day. In reports dated December 4, 2009 and February 22, 2010, Dr. Morganstein did not indicate that there were any changes in her work restrictions.

On February 25, 2013 appellant filed a Form CA-2a claiming that she sustained a recurrence of total disability beginning from November 21, 2009 due to her April 5, 2009 work injury. On the Form CA-2a she asserted that her recurrence was due to the employing establishment's withdrawal of her limited-duty job. On the second page of the Form CA-2a, an employing establishment official indicated that appellant was terminated during her probationary period effective November 28, 2009. Appellant also submitted a Form CA-7 claiming total disability wage-loss compensation for the period beginning November 22, 2009.

In a March 13, 2013 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her recurrence of disability claim within 30 days of the date of the letter. Another March 13, 2013 development letter was also sent to the employing establishment requesting comments from a supervisor on the accuracy of appellant's statements.

[2] Appellant previously attempted to return to limited-duty work in June 2009 but was unsuccessful in her attempt.

[3] In an attached form report, Dr. Piper indicated that appellant could lift up to 10 pounds.

Appellant's representative argued that the claim for recurrence was based upon the fact that appellant's employing establishment withdrew her limited-duty position. He stated that this created a recurrence of total disability and requested that she be paid appropriate wage-loss compensation.

In a March 19, 2013 letter, Donna Estep, director of the employing establishment's injury compensation office, confirmed that appellant worked in a limited-duty position until November 28, 2009 when her employment was terminated, during her probationary period, due to multiple unauthorized absences, and failure to appropriately request leave. She stated that the employing establishment's decision to terminate appellant's employment was administrative in nature and wholly unrelated to the April 5, 2009 work injury. Appellant explained that, as of the date of her termination, the limited-duty job remained available and would have continued to remain available to her but for the termination due to her misconduct.

In an April 22, 2013 decision, OWCP determined that appellant had not met her burden of proof to establish a recurrence of total disability on or after November 21, 2009 due to her April 5, 2009 work injury. It found that her termination on November 28, 2009 did not constitute a recurrence of total disability because the termination was for cause and not related to her April 5, 2009 work injury.

Appellant requested a telephone hearing with an OWCP hearing representative. During the September 12, 2013 hearing, appellant's representative argued that she was terminated for frequent absences and failure to appropriately request leave, and asserted that these offenses constituted mere disobedience of a rule or regulation. He posited that such disobedience did not necessarily place a claimant outside the scope of his or her employment such that he or she would lose benefits under FECA. Appellant's representative cited the Board decision, *T.K.*,[4] in support of his position. Appellant was provided an opportunity to submit a statement within 30 days of the date of the hearing clarifying her periods of employment, work capacity, and disability following her April 5, 2009 work injury. It was specifically requested that she provide a timeline regarding when she worked, in what capacity she worked, and when she was disabled between her April 5, 2009 injury, and November 28, 2009 termination.

Following the hearing, appellant submitted a December 19, 2013 statement in which she noted:

> "In further support of my appeal, I would like to state that I accepted a limited duty offer and returned to work on light duty at the New Cumberland Army Depot in June 2009. My treating physician cleared me for light duty with the following restrictions: I could work only five hours a day, I was not to do any lifting or pulling, and if my back started bothering me, I was to take a break. My job was making labels, which entailed keeping the two label machines filled. Each machine held about 200 labels. When they would run out, I would have to refill the machines, and pack the finished labels in boxes."

[4] Docket No. 93-2359 (issued on April 12, 1995). *See infra*.

In a January 10, 2014 decision, the hearing representative affirmed OWCP's April 22, 2013 decision noting that appellant's termination on November 28, 2009 did not constitute a recurrence of total disability because the termination was for cause and was not related to her April 5, 2009 work injury. He indicated that he would not engage in a "detailed discussion of the medical evidence" but noted that she had not submitted medical evidence showing that her April 5, 2009 work injury caused her to sustain a recurrence of total disability on or after November 21, 2009.

LEGAL PRECEDENT

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 resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.[5] This term also means an inability to work that takes place when a limited-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations. A recurrence of disability does not apply when a limited-duty assignment is withdrawn for reasons of misconduct, nonperformance job duties or other downsizing or where a loss of wage-earning capacity determination as provided by 5 U.S.C. § 8115 is in place.[6]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a limited-duty position or the medical evidence of record establishes that he or 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 show that he or she cannot perform such light duty. As part of this burden the employee may submit rationalized medical evidence showing 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.[7]

ANALYSIS

On May 7, 2009 appellant filed a traumatic injury claim stating that on April 5, 2009 she sustained an injury when she attempted to move a heavy box at work. OWCP accepted her claim for a lumbar sprain/strain and right elbow lateral epicondylitis. Appellant stopped work on April 5, 2009 and received compensation on the daily rolls. On July 28, 2009 she returned to limited-duty work for the employing establishment in a job that involved making labels and required working for five hours a day, five days a week. Appellant was not required to engage in lifting or pulling and she was able to take breaks as necessary. On February 25, 2013 she filed a Form CA-2a claiming that she sustained a recurrence of total disability beginning on

[5] 20 C.F.R. § 10.5(x); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2b (June 2013).

[6] *Id.*

[7] *S.F.*, 59 ECAB 525 (2008); *Terry R. Hedman*, 38 ECAB 222 (1986).

November 21, 2009 due to her April 5, 2009 workplace injury. On the Form CA-2a appellant asserted that her recurrence was due to the employing establishment's withdrawal of her limited-duty job. She also filed a Form CA-7 claiming total disability wage-loss compensation for the period November 22, 2009 to March 1, 2013.

The Board finds that OWCP properly determined that appellant's termination on November 28, 2009 did not constitute a recurrence of total disability because the termination was for cause and not related to her April 5, 2009 work injury. The evidence of record reveals that appellant's termination was for misconduct, during her probationary period, due to multiple unauthorized absences, and failure to appropriately request leave. The employing establishment's termination of her employment was administrative in nature and wholly unrelated to the April 5, 2009 work injury.[8] As noted above, when a claimant stops work for reasons unrelated to the accepted employment injury, there is not disability within the meaning of FECA.[9] As the evidence establishes that such termination was due to appellant's unauthorized absences and failure to appropriately request leave, matters unrelated to her April 5, 2009 accepted work injury, she is not entitled to disability wage-loss compensation under FECA on this basis.

The Board further finds that appellant has not submitted medical evidence showing a change in her work-related condition rendering her totally disabled on or after November 21, 2009.[10] On appeal, Appellant's representative argued that OWCP did not consider the medical evidence of record. However, a review of the January 10, 2014 decision shows that the hearing representative adequately considered the medical evidence of record and determined that it failed to show that appellant was unable to work on or after November 21, 2009 due to her April 5, 2009 work injury.

The Board finds that the medical evidence of record establishes that the April 5, 2009 work injury did not prevent appellant from performing her limited-duty assignment. In a November 2, 2009 report, Dr. Piper, a Board-certified orthopedic surgeon serving an OWCP referral physician, noted that appellant could continue to work as a label maker. He stated, "She is presently working 5 hours a day and I believe that she could go to 10 hours a day in the near future if her TENS unit is working as well as it has over the past day and if she has a cortisone injection for her lateral epicondylitis of the right elbow." In a note dated November 9, 2009, Dr. Morganstein, her attending osteopath, indicated that appellant could lift or carry up to 20 pounds and that she could work up to five hours a day.

Before OWCP and on appeal, appellant's representative argued that the Board's ruling in *T.K.*[11] was supportive of ongoing entitlement to compensation in this case. In *T.K.*, the Board found that OWCP had not met its burden of proof to rescind acceptance of the case based on a

[8] The employing establishment indicated that, as of the date of appellant's termination, the limited-duty job remained available and would have continued to be available but for her termination due to her misconduct.

[9] *See supra* note 6.

[10] *See supra* note 7.

[11] *See supra* note 4.

legal argument that the claimant had deviated from his employment and was not engaged in activities reasonably incidental to the performance of his employment duties when injured. The claimant was a letter carrier who, when injured, had departed from his normal mail route into the breezeway of a residence to obtain a statement from the home owner regarding preference as to whether the claimant should walk across the home owner's front lawn while delivering his route. The Board found that the claimant's deviation into the breezeway where the injury occurred was incidental to his employment and did not take him out of the performance of his duties. Appellant's representative has not explained how the Board's findings in *T.K.* would be relevant to the issues in this case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of total disability on or after November 21, 2009 due to her April 5, 2009 work injury.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 29, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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