United States Department of Labor
Employees' Compensation Appeals Board

DARLENE A. LUCK, Appellant	)	
and	)	**Docket No. 04-1615**
	)	**Issued: February 3, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Albany, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On June 7, 2004 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated May 10 and January 9, 2004, in which the Office denied her recurrence claim on the grounds that the withdrawal of her light-duty assignment was based on misconduct. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the recurrence claim.

ISSUE

The issue is whether the Office properly denied appellant's claim for a recurrence of disability. Appellant asserts on appeal that the Office lacked sufficient evidence to conclude that appellant engaged in misconduct such that it improperly concluded that she did not have a recurrence of disability when the employing establishment withdrew her light-duty job.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated August 15, 2003, the Board set aside the Office's March 26, 2003 decision pertaining to the issues of amount of

overpayment, waiver and recovery.[1] The history of the case as set forth in the Board's prior decision is incorporated herein by reference. However, to the extent that evidence is germane to the issue at hand, it will be set forth as necessary.

The Office accepted that appellant, then a 39-year-old rural mail carrier, sustained a left trapezium strain causally related to her employment on June 21, 2002. The Office later amended its acceptance to a thoracic outlet syndrome. Appellant stopped work on July 2, 2002. The Office paid appropriate compensation and eventually placed appellant on the periodic rolls.

On February 28, 2003 appellant underwent a second opinion examination with Dr. Richard S. Goodman, a Board-certified orthopedic surgeon. In a March 1, 2003 report, Dr. Goodman opined that appellant's thoracic outlet syndrome was temporary in nature and would resolve after appropriate care. He further opined that, although appellant could not do her regular duties, she was able to do sedentary work with no lifting over 10 pounds with the arms below shoulder level. In a March 27, 2003 conference between the Office and the employing establishment, it was determined that a limited-duty job offer could be offered based on Dr. Goodman's restrictions.

By letter dated April 1, 2003, the employing establishment offered appellant a limited-duty assignment as a rural carrier associate. The duties of the position required: providing customer service and assistance by answering the telephone; writing up first and second notices for accountable mail; filing; reviewing material; casing occupant mail up to shoulder height; and delivering express mail as needed. The physical requirements of the job were primarily sedentary, intermittent standing and walking, simple grasping, no lifting over 10 pounds with the arms below shoulder level, with occasional operation of a motor vehicle. By letter dated April 2, 2003, the Office advised appellant that the job offer was medically suitable with regard to her ability to work.

Appellant was also interviewed by the Postal Inspection Service on April 2, 2003 pertaining to her workers' compensation claim. During the interview, appellant initially denied working in the 15 months prior to the signing of her OWCP Form EN1032 dated February 22, 2003, but later admitted that she may have handled some transactions at her boyfriend's store. She further stated that she did not believe that helping out in a store was work. In a handwritten statement dated April 2, 2003, appellant stated that she may have handled some transactions at J. Pettey's Appliance Store, locked the door and answered the telephone, but did not realize that it was considered volunteer work.

On April 7, 2003 appellant returned to work in a limited-duty position. She was subsequently terminated for cause.

On April 15, 2003 the Office received an April 11, 2003 investigative memorandum from the Postal Inspection Service. The April 11, 2003 investigative memorandum reported detailed findings of their investigation that appellant was observed and taped working in a store during a period in which she claimed to be totally disabled.

[1] Docket No. 03-1215.

On July 3, 2003 appellant filed a recurrence claim commencing April 7, 2003 due to withdrawal of her light-duty position. She stated that when she reported to the light-duty position on April 7, 2003, she was instructed to sign the job acceptance form and was immediately told to stop work. She asserted that the limited-duty position offered was not in good faith, was never provided and was immediately withheld. The employing establishment stated that the limited-duty assignment was created as a result of a work capacity determination by the Office's directed second opinion examination on February 28, 2003 by Dr. Goodman and that the job offer was deemed suitable in an Office letter of April 2, 2003. The employing establishment further stated that appellant was terminated for cause.

On October 6, 2003 the Office and the employing establishment engaged in a conference to discuss the issue pertaining to appellant's average annual earnings, which the Office had been instructed by the Board to further develop, and appellant's claimed recurrence of disability for a job offer allegedly not offered in good faith. Regarding the recurrence claim, the employing establishment was asked why it had offered appellant a light-duty position and then terminated appellant; the employing establishment responded that the light-duty position was offered because the Office had sent appellant for a second opinion examination and the results indicated that she was capable of working light duty. The employing establishment further explained that the light-duty job offer was requested by the Office. The employing establishment then offered the position to appellant and stated that she had reported to work, clocked in and was getting her assignments when the postal inspectors entered the facility and met with postal management. After this meeting, appellant was terminated for cause based on the information uncovered by the postal inspectors during their investigation of appellant. The employing establishment stated that the investigation had nothing to do with the decision to offer appellant light duty, and the decision to offer the job had nothing to do with appellant's removal from the employing establishment. The employing establishment explained that the investigation conducted by the inspection service was independent of the actions taken by injury compensation. The employing establishment further stated that the decision to remove appellant was made at the conclusion of the Postal Inspection Service's investigation after consulting with management. This decision was not made at the time the offer of employment was extended to appellant or at the time she had reported to work and accepted the position.

In a letter dated October 9, 2003, the Office provided both the employing establishment and appellant a copy of the October 6, 2003 telephone conference and allowed 15 days to submit written comments.

In an October 20, 2003 letter, appellant noted that the employing establishment admitted to consultation with the Postal Inspection Service. Appellant's attorney expressed his disagreement with the employing establishment's explanation of the process through which she returned to work and asserted that appellant was misled into returning to work.

By decision dated January 9, 2004, the Office denied appellant's recurrence claim on the grounds that the withdrawal of her light-duty assignment, which also resulted in termination from the employing establishment, was due to misconduct.[2]

In a February 10, 2004 letter, appellant requested reconsideration of the Office's January 9, 2004 decision. Appellant argued that the Office improperly determined that appellant was engaged in misconduct as the evidence of file demonstrated that she was not "working" as she failed to receive any compensation for her activities, did not have the requisite knowledge and mental state required to be charged with misconduct. Submitted was a duplicate copy of the April 10, 2003 investigative memorandum, a duplicative copy of appellant's EN1032 form signed February 22, 2003 along with the Office's standard cover letter to such form; and a duplicate copy of appellant's claim for compensation for the period November 3 to December 9, 2002.

By decision dated May 10, 2004, the Office denied modification of its previous decision.

LEGAL PRECEDENT

When an employee, who is disabled from the job he or she held when injured on the account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-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 to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[3]

Office regulations state that a recurrence of disability includes a work stoppage caused by withdrawal of a light-duty assignment made specifically to accommodate the claimant's condition due to the work-related injury.[4] However, this withdrawal must have occurred for reasons other than misconduct or nonperformance of job duties.[5]

ANALYSIS

The record reveals that appellant was terminated from her employment due to misconduct. Accordingly, the evidence of record would have to establish that the termination of appellant's light-duty assignment effective April 7, 2003 was due to her physical inability to perform her assigned duties, rather than misconduct.

[2] The Office also issued a preliminary overpayment finding on January 9, 2004. However, no final decision has been rendered.

[3] *Albert C. Brown*, 52 ECAB 152 (2000).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.3(1)(b) (May 1997).

[5] *Id.*

The record is also devoid of any medical evidence that appellant was not and could not perform her limited-duty assignment as a rural carrier associate at the time that she was terminated due to misconduct. Appellant has not alleged nor has she submitted any medical evidence to show a change in the nature and extent of her injury-related condition. The medical evidence establishes that appellant was unable to perform her date-of-injury position, but supports her ability to perform the duties of a rural carrier associate. The physical requirements of the light-duty position are consistent with Dr. Goodman's March 1, 2003 restrictions. There is no medical evidence of file which supports an increased disability or a change in the nature of her injury-related condition. Accordingly, the medical evidence fails to establish that appellant was unable to perform the duties of her position at the time she was terminated.

Although appellant was terminated from the employing establishment the same day she reported for her limited-duty assignment, the record reflects that her work stoppage was due to her removal from work as a result of misconduct. The Board has held that an employing establishment's termination of employment for unacceptable conduct by the employee does not establish "disability" for work within the meaning of the Federal Employees' Compensation Act.[6] The employing establishment stated that the decision to remove appellant on April 7, 2003 was made at the conclusion of the Postal Inspection Service's investigation after consultation with employing establishment's management. The record reflects that appellant was interviewed by the Postal Inspection Service on April 2, 2003. It is reasonable that it took five days for the Postal Inspection Service to wrap up its investigation and report to the employing establishment on April 7, 2003. It is also reasonable that, on April 7, 2003, the employing establishment had enough information to make a decision to terminate appellant for cause as the Postal Investigation Service investigation had uncovered that appellant was working/volunteering at a store during a period during which she claimed to be totally disabled. Thus, the employing establishment had enough information available to terminate appellant for cause, and there is no other evidence to support that the termination was not for cause. As the evidence of record establishes that appellant's work stoppage was due to misconduct, she did not sustain a recurrence of disability within the meaning of the Act.[7]

Additionally, appellant has not provided sufficient evidence to support her allegations that the employing establishment withdrew her light-duty assignment for reasons other than her purported misconduct. Appellant contends that the employing establishment did not offer her the light-duty position in good faith. The record, however, establishes that the employing establishment offered appellant a limited-duty assignment on April 1, 2003 and she was interviewed by the Postal Investigation Service on April 2, 2003. As there is no evidence that the Postal Inspection Service had completed its investigation into appellant's workers' compensation claims on April 2, 2003, this evidence substantiates that the withdrawal of appellant's limited-duty assignment was premised on her misconduct. Appellant further contends that she was not "working" during a period that she claimed to be totally disabled as she did not receive any compensation for her activities and, thus, did not have the requisite knowledge and mental state to be charged with misconduct. The question of whether or not appellant had the mental state to be charged with misconduct, however, relates to a medical issue

[6] *John W. Normand*, 39 ECAB 1378 (1988).

[7] *Id.*

and the record is devoid of any medical evidence pertaining to appellant's state of mind and/or capacity. In any event, as noted above, the evidence indicates that the employing establishment terminated appellant from the light-duty position for cause and there is no evidence, other than appellant's unsupported assertions, that this was not the case. Accordingly, the record does not establish that appellant was dismissed for reasons other than her misconduct.

CONCLUSION

The Board finds that appellant did not meet her burden of proof in establishing a recurrence of disability.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated May 10 and January 9, 2004 are affirmed.

Issued: February 3, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member