United States Department of Labor
Employees' Compensation Appeals Board

V.B., Appellant	)	
	)	
and	)	**Docket No. 08-463**
	)	**Issued: August 19, 2008**
U.S. POSTAL SERVICE, POST OFFICE, West Lithonia, GA, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' November 19, 2007 decision finding that she had not established a recurrence of her accepted low back condition on August 27, 2007. Under 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 was entitled to wage-loss compensation benefits as of August 27, 2007.

FACTUAL HISTORY

On May 31, 2003 appellant, a 33-year-old mail handler injured her lower back when she attempted to move a cage of mail. She filed a claim for benefits on May 31, 2003, which the Office accepted for low back strain and herniated disc. The Office paid appellant appropriate compensation for temporary total disability.

Appellant underwent L5 laminectomy and L5-S1 lumbar fusion surgery on August 10, 2004. The surgery was performed by Dr. Lee A. Kelley, Board-certified in orthopedic surgery.

In a work capacity evaluation dated November 27, 2006, Dr. Kelley stated that appellant had reached maximum medical improvement and could return to an eight-hour workday with restrictions of no sitting for more than four hours per day; no walking, standing or operating a motor vehicle for more than one hour per day; no pushing, pulling, or lifting exceeding 10 pounds for more than one hour per day; and no reaching, reaching above the shoulder, twisting, bending, stooping, squatting, kneeling or climbing. He indicated that appellant should be allowed to take breaks on as needed basis for up to 15 minutes.

In a December 7, 2006 report, Dr. Kelley stated:

> "[Appellant] has chronic pain after a lumbar fusion and in my opinion her pain management is likely to be ongoing into the foreseeable future and her restrictions are permanent. She will be capable of working only at a sedentary job status with the ability to alternate sitting and standing on a regular basis and take breaks on a regular basis as indicated…."

On August 3, 2007 the employing establishment offered appellant a job as a modified mail handler within Dr. Kelley's restrictions.[1] Appellant accepted the job on August 14, 2007 and reported to the worksite on August 26, 2007.

In an August 20, 2007 report, Dr. Kelley stated:

> "[Appellant] is status post lumbar fusion from August 10, 2004. She presents with complaints of low back pain primarily in the morning with shooting pain into both of her legs and her feet. [Appellant] also complains of numbness in both feet stating that she cannot wear shoes that are closed toed. She is supposed to return to work on August 24, 2007. [Appellant] is currently out of work. She has been released to permanent sedentary to light status."

Dr. Kelley noted no changes on physical examination. Appellant reported mild pain and limitation with lumbosacral bending. Dr. Kelley stated that appellant's lower extremity motor and sensory functions were intact bilaterally, with no change in her lower extremity deep tendon reflexes. He advised that appellant continued to experience chronic low back pain.

[1] Appellant's modified mail handler job consisted of two basic components: (1) Rewrap: Appellant would be required to take damaged items from a bin placed on a table and seal them in plastic. She could choose to sit or stand, and would walk a short distance to the wrapping machine. Appellant would be required to lift small packages weighing less than 10 pounds. For packages weighing more than 10 pounds, she could request assistance. No stooping or bending was required. (2) Semi Induction Machine: Appellant would sit on a stool and could choose to sit or stand. She was not required to lift more than 10 pounds. Appellant was required to tip over magazines or package to view mailing labels of magazines on a belt. She would push a button to start the belt to read the address label. If the address label was not readable by camera, appellant would take the items and put them in a bin on the floor in the worksite area.

In a return to work form dated August 30, 2007, Dr. Kelley wrote "continue current light duty, four hours per eight[-]hour day only!"

Appellant submitted CA-7 forms requesting compensation for wage loss for the following periods: August 26 to September 12 and September 16 to 27, 2007.

A time analysis Form CA-7a dated October 5, 2007 indicated that appellant worked 8 hours on August 26, 2007; 3.92 hours on August 27, 2007, using 4.08 hours of leave; 0 hours on August 28, 2007; 5.4 hours on August 29, 2007, using 2.60 hours of leave; 4 hours on August 30, 2007 and September 4, 2007, using 4 hours of leave on both days; 2.68 hours on September 10, 2007, using 5.32 hours of leave. An October 11, 2007 time analysis Form CA-7a indicated that appellant worked four hours per day from September 16 to 27, 2007, using four hours of leave each workday.

By letter dated October 19, 2007, the Office requested additional information from appellant in support of her recurrence claim. It asked her to submit probative, rationalized medical evidence establishing disability for the periods claimed.

In reports dated September 17 and October 10, 2007, Dr. Kelley related that appellant had continued complaints of pain. He stated that appellant had pain in her low back and down both of her legs along the posterolateral thighs into the calves and plantar aspects of both feet; she also showed limited lumbar range of motion. Appellant also was tender on palpation across the lumbosacral spine, with pain and limitation with flexion and extension and right and left side bending. Dr. Kelley noted that appellant was working light duty as of August 26, 2007 but had to take time off because she experienced increasing, significant pain and was unable to perform most of her daily activities at work. In a Form CA-20 report dated October 23, 2007, he reiterated that appellant was working light duty with restrictions.

By decision dated November 19, 2007, the Office denied appellant compensation for a recurrence of her accepted low back condition. It found that she failed to meet her burden to show that she had an objective worsening of her work-related back condition as of August 27, 2007 or that the August 2007 job offer exceeded her work restrictions.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[2] Generally, the Office can meet this burden by showing that the employee returned to work; even if that work is light duty rather than the date-of-injury position, if thereafter the employee earns no less than he had before the employment injury.[3] A short-lived and unsuccessful attempt to

[2] *Vivien L. Minor*, 37 ECAB 541 (1986).

[3] *Billy Sinor*, 35 ECAB 419 (1983).

return to duty, however, does not automatically discharge the Office's burden to justify termination of compensation.[4]

ANALYSIS

In the instant case, the Office accepted that appellant sustained low back strain and herniated disc on May 31, 2003, the Office authorized L5 laminectomy and L5-S1 lumbar fusion surgery which was performed on August 10, 2004. Appellant was paid total disability compensation until August 26, 2007. She returned to work for one day on August 26, 2007, and therefore worked part-time hours, averaging four hours a day through September 27, 2007. In its decision, the Office characterized appellant's claim for compensation starting on August 27, 2007 as a claim for recurrence of total disability due to her employment injury. It placed the burden of proof for establishing disability on her, indicating that she had the burden of poof to show that she was totally disabled from light-duty work. The Office found that appellant did not meet her burden of proof and did not pay wage-loss compensation after August 27, 2007. As noted however, a short-lived return to work does not shift the burden of proof regarding employment-related disability. The Board has held that such a shift in burden of proof is not appropriate when there is a brief return to work and the medical evidence does not establish that the claimant could continue to perform the light-duty job.

The Board finds no probative medical evidence establishing that appellant's employment-related condition had ceased on or after August 27, 2007 or that her inability to perform the light-duty job was not related to her employment injury. Although Dr. Kelley had initially indicated that appellant could return to light-duty work for eight hours a day, after appellant attempted to work full time, on August 30, 2007 he reported that appellant was only capable of working four hours a day. The medical evidence subsequently submitted consisted of Dr. Kelley's August 30, September 17, October 10 and 23, 2007 reports. Dr. Kelley related complaints of continued low back pain, with pain radiating down both of appellant's legs along the posterolateral thighs into the calves and plantar aspects of both feet. He stated that she also was tender on palpation across the lumbosacral spine, with pain and limitation with flexion and extension and right and left side bending. Dr. Kelley also noted limited lumbar range of motion. He noted that appellant began working light duty as of August 26, 2007 but had to take time off because she experienced increasing, significant pain in her lower back. The medical evidence of record therefore supported a finding that she could only work light duty on a part-time basis after her return to work in August 2007.

It remains the Office's burden of proof to terminate compensation, and the Board finds that the Office essentially terminated wage-loss compensation benefits without meeting its burden in this case.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in this case.

[4] *Fred Reese*, 56 ECAB 568 (2005).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2007 decision of the Office of Workers' Compensation Programs be reversed.

Issued: August 19, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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