

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

T.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Glouster, OH, Employer**

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**Docket No. 08-687
Issued: July 11, 2008**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 31, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' December 3, 2007 merit decision. Pursuant to 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 has established disability for wage loss commencing July 18, 2006.

FACTUAL HISTORY

On August 24, 2006 appellant, then a 41-year-old part-time flexible carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained a back condition causally related to her federal employment. She identified the carrying of her mailbag as the factor of employment contributing to her condition. Appellant stopped working on July 17, 2006. In her work history, she reported that she began working for the employing establishment in December 2000.

In a report dated August 24, 2006, Dr. Alex Minard, an orthopedic surgeon, diagnosed lumbar radiculitis with degenerative disc disease and facet arthropathy. In a report dated October 11, 2006, he opined that appellant was totally disabled from July 18, 2006. Dr. Minard stated that the conditions were “related to work in that it occurred as a repetitive stress or overuse injury from repetitive carrying of a mailbag and repetitive stooping to deliver mail.... It has likely existed for several years and gradually worsening, but it was probably primarily caused by the occupational factors discussed.”

By letter dated November 27, 2006, the Office accepted lumbar degenerative disc disease, lumbar facet arthropathy and lumbar radiculitis. In a “modification of decision” dated December 5, 2006, it stated that the only accepted condition was lumbar radiculitis. The Office stated that Dr. Minard reported work factors over many years had caused the diagnosed conditions, but appellant had been in her current position for nine and a half months. According to the Office, lumbar facet arthropathy and lumbar degenerative disc disease were preexisting conditions that developed over many years.

In a duty status report (Form CA-17) dated January 9, 2007, Dr. Minard provided work restrictions. Appellant submitted a claim for compensation (Form CA-7) for the period July 18, 2006 to January 26, 2007. She also filed claims for compensation from February 3 to 27, 2007. An employing establishment memorandum indicated that she returned to work at four hours per day in February 2007.

By decision dated April 2, 2007, the Office denied the claim for wage-loss compensation commencing July 18, 2006. It advised appellant that the evidence necessary to support her claim for disability “must include a discussion of objective findings which support that you were unable to return to work in *any capacity* during the period claimed.” (Emphasis in the original).

The employing establishment reported that appellant resigned effective May 9, 2007. In addition, it reported that appellant had worked from December 4, 2000 to January 11, 2002, November 16, 2002 to July 28, 2003 and October 1, 2005 to May 9, 2007.

On April 20, 2007 Dr. Minard opined that appellant was disabled from July 18, 2006. He stated that appellant’s back pain had become worsened by mid July 2006 and she could only stand or sit for short periods. Dr. Minard reported appellant had objective findings that included spasms with restricted range of motion. He noted that appellant was able to return to work February 28, 2007 as the employing establishment offered appellant a position within her work restrictions. Dr. Minard noted that the Office had not accepted degenerative disc disease and facet arthropathy as appellant had only been in her current position since October 2005. Dr. Minard stated, “I certainly agree that working from October 2005 until the summer of 2006 would not be long enough to attribute the degenerative changes to work. However, [appellant] has actually been employed by the [employing establishment] since 2000 which is six full years of the repetitive motion, lifting, bending, and twisting, which in my medical opinion is long enough to account for the degenerative findings.”

By decision dated December 3, 2007, the Office reviewed the case on its merits and denied modification. The Office found that Dr. Minard had an inaccurate history, as appellant

“only worked a total of 1,539.11 hours [from December 6, 2000], which is substantially less than the 2,080 possible work hours during a given calendar year.”

LEGAL PRECEDENT

An employee seeking benefits under the Federal Employees’ Compensation Act¹ has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.² The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.³

ANALYSIS

Appellant filed an occupational disease claim alleging a back injury causally related to her work as a letter carrier since December 2000. The record indicated appellant worked intermittently since that time. The Office initially accepted lumbar degenerative disc disease, facet arthropathy and lumbar radiculitis. On December 5, 2006 the Office rescinded acceptance of degenerative disc disease and facet arthropathy, based on the determination that appellant had only worked as a letter carrier since October 2005 and its own medical determination that these conditions required a longer period to develop.⁴

With respect to disability commencing June 18, 2006, the Office denied the claim on April 2, 2007, applying a standard of disability that required appellant to show she was disabled for work in “any capacity.” This is an incorrect assessment of the issue presented. Appellant does not have the burden to show she was unable to perform any work. In this case appellant was working as a letter carrier and is claiming compensation for wage loss commencing June 18, 2006. Her burden of proof is to establish she was unable to perform the letter carrier duties as a result of an employment-related condition. The Office did not properly address the issue in its April 2, 2007 decision.

Appellant submitted an April 20, 2007 report from Dr. Minard that provided an unequivocal opinion that appellant was disabled as of July 18, 2006 due to an employment-related condition. Dr. Minard specifically addressed the concerns raised by the Office in its April 2, 2007 decision and opined the degenerative condition was causally related to the identified employment factors over a period of years. While appellant did not work full time for six years, the Office noted appellant had worked over 1,500 hours since December 2000. There

¹ 5 U.S.C. §§ 8101-8193.

² *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

³ 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

⁴ The Board does not have jurisdiction over a December 5, 2006 decision, as it was issued more than one year prior to the filing of the appeal in this case. 20 C.F.R. § 501.3(d)(2). The Board also notes the decision in the record did not appear to include appeal rights.

is nothing in the record that is sufficient to diminish the probative value of Dr. Minard's opinion that appellant's repetitive actions over a period of years contributed to a degenerative back condition and caused disability for work as of July 18, 2006.

The Board finds that the record contains uncontroverted supportive medical evidence that requires further development of the evidence.⁵ On remand the Office should secure probative medical evidence on the issues of whether a degenerative disc condition or other condition should be included as an accepted employment injury, and whether there was an employment-related disability on or after July 18, 2006. After such further development of the record as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

Appellant has submitted sufficient evidence to require further development of the record.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 3, 2007 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: July 11, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

⁵ See *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *Rebel L. Cantrell*, 44 ECAB 660 (1993); *Udella Billups*, 41 ECAB 260 (1989).