

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT V. DISALVATORE and DEPARTMENT OF THE NAVY,
PHILADELPHIA NAVAL SHIPYARD, Philadelphia, Pa.

*Docket No. 97-1367; Submitted on the Record;
Issued December 24, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant had any disability after March 3, 1996, causally related to his January 21, 1994 lumbosacral strain injury.

The Board has given careful consideration to the issue involved, the contentions of appellant on appeal and the entire case record. The Board finds that the December 11, 1996 decision of the Office of Workers' Compensation Programs' hearing representative is in accordance with the facts and the law in this case, and hereby adopts the findings and conclusions of the hearing representative.

On appeal appellant's representative argues that appellant still suffers left leg pain into his foot and occasional right leg pain, that a February 8, 1994 magnetic resonance imaging scan demonstrated bilateral disc protrusions at L2-3 and L4-5 causing nerve impingement, that an electromyogram performed December 14, 1994 demonstrated chronic left L3-4 radiculopathy, and that appellant could only perform sedentary duty. The Board notes, however, that appellant's January 21, 1994 employment injury was only accepted for lumbosacral strain and not for bulging discs or radiculopathy. The weight of the medical evidence of record supports that appellant's current complaints are due to degenerative disc disease, not due to a January 21, 1994 soft tissue muscular strain injury, which the impartial medical examiner opined had completely resolved. The fact that appellant has objective manifestations of other pathology or pathologic processes, is irrelevant to the Office's determination that he no longer has disability related to his accepted condition of soft tissue lumbosacral muscular strain.

As used in the Federal Employees' Compensation Act,¹ the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.² Disability is thus not synonymous with physical impairment, which may or

¹ 5 U.S.C. §§ 8101-8193.

² *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38

may not result in an incapacity to earn wages.³ An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.⁴ When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁵ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost.⁶

In this case, the weight of the medical evidence, as represented by the well-rationalized opinion of the impartial medical examiner, supports that appellant has no continued disability due to his accepted condition of lumbosacral strain. When there exists opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷ According to the impartial medical examiner's report that, special weight results in it clearly becoming the weight of the medical opinion evidence, and establishes that all residuals from appellant's accepted January 21, 1994 soft tissue lumbosacral muscular strain injury have resolved and no longer cause him disability for work.

(1948); 20 C.F.R. § 10.5(17).

³ See *Fred Foster*, 1 ECAB 21 at 24-25 (1947) (finding that the Act provides for the payment of compensation in disability cases upon the basis of the impairment in the employee's capacity to earn wages, and not upon physical impairment as such).

⁴ See *Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of work-related thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

⁵ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁶ *George W. Coleman*, 38 ECAB 782 (1987).

⁷ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Consequently, the decision of the Office of Workers' Compensation Programs dated December 11, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 24, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member