

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

RAY D. LEWELLING, Appellant

and

**DEPARTMENT OF THE AIR FORCE, TINKER
AIR FORCE BASE, OK, Employer**

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**Docket No. 05-758
Issued: August 8, 2005**

Appearances:
Ray D. Lewelling, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge

JURISDICTION

On February 10, 2005 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated June 1 and November 8, 2004 which denied his claim that he was totally disabled for the period November 14, 2003 to January 21, 2004. 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 met his burden of proof to establish that he was totally disabled for the period November 14, 2003 to January 21, 2004 causally related to his accepted emotional condition.

FACTUAL HISTORY

On October 9, 2003 appellant, then a 41-year-old machinist, filed an occupational disease claim, alleging that he sustained employment-related tennis elbow. He did not stop work, and his supervisor noted that he began working limited duty on September 29, 2003. On November 6, 2003 the Office accepted that appellant sustained work-related right lateral

epicondylitis. Appellant was removed for cause on November 13, 2003. The specific reason given was delay in carrying out assigned work in a reasonable period of time and the notice listed seven incidents in which appellant was assigned tasks which the notice stated, should have taken only a few hours but which took a number of days.¹ On December 3, 2003 he filed a Form CA-7, claim for compensation, for the period November 14, 2003 and following.

Appellant's attending physician, Dr. Mehdi N. Adham, who is Board-certified in plastic surgery with a subspecialty in surgery of the hand, provided a number of treatment notes and form reports. In a treatment note dated September 29, 2003, the physician diagnosed radial tunnel syndrome and provided the restriction that appellant should work modified duty, with no reaching overhead. An employing establishment physician, Dr. James D. Reeves, agreed with these restrictions. In reports dated October 3 and 13, November 10 and December 2, 2003, Dr. Adham reiterated that appellant could work modified duty.

On January 21, 2004 appellant filed a second Form CA-7, claim for compensation in which the employing establishment noted that he had been terminated for misconduct. In a letter dated January 23, 2004, the employing establishment controverted the CA-7 claim, noting that work was available, repeated that appellant was removed for misconduct, and provided information regarding previous personnel actions against appellant in August and October 2000 and April and June 2002.²

By decision dated February 24, 2004, the Office denied appellant's claim for wage-loss compensation, noting that the medical evidence of record did not establish that he was totally disabled for work.³ On March 3, 2004 appellant requested a hearing that was held on July 28, 2004. At the hearing appellant testified that he had been working with restrictions when he was terminated, but that he could not work as fast due to his employment injury. The hearing representative explained the type of evidence needed to support total disability and appellant was given 30 days in which to respond.

Subsequent to the hearing, the employing establishment submitted clinic notes dated September 15 through November 10, 2003 which described appellant's treatment and that light duty had been prescribed. The employing establishment also submitted a decision from the Merit Systems Protection Board (MSPB) which found that appellant's removal was reasonable. Appellant, however, appealed this decision.

¹ The record contains a report of investigation, a Notice of Proposed Removal dated September 15, 2003 and a Notice of Decision to Remove effective November 13, 2003.

² The record contains copies of an August 14, 2000 notice of proposed removal, an October 18, 2000 notice of decision to suspend, an April 11, 2002 notice of proposed suspension, and a June 12, 2002 notice of decision to suspend.

³ Dr. Adham continued to submit reports and recommended surgery that was performed on March 18, 2004. In a treatment note dated May 13, 2004, he advised that appellant could return to modified duty. Appellant continued under Dr. Adham's care, and nerve conduction studies on June 25, 2004 were normal. In a July 8, 2004 report, Dr. Adham advised that appellant had a three percent right upper extremity impairment and dismissed him from his care. Appellant thereafter came under the care of Dr. Robert S. Unsell, a hand surgeon, who provided a 10-pound lifting, pushing and pulling weight restriction.

Appellant submitted reports from his attending hand surgeon, Dr. Unsell, dated July 15 to September 9, 2004 in which the physician diagnosed a history of tennis elbow release and radial tunnel release and provided a 10-pound weight restriction, and in a letter dated September 6, 2004, advised the hearing representative that his MSPB decision was pending.

By decision dated November 8, 2004, the Office hearing representative affirmed the prior decision.⁴

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act⁵ the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁶ Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,⁷ and whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.⁸ Whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁹

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and

⁴ The hearing representative, however, noted that appellant was entitled to wage-loss compensation for the period March 18 to May 13, 2004 due to his surgery and postoperative recovery, and he received compensation for this period. He subsequently underwent a second surgical procedure on November 16, 2004, performed by Dr. Unsell, who on January 3, 2005 released him to limited duty with a 10-pound weight restriction that was raised to 20 pounds on January 31, 2005. Appellant thereafter submitted a number of CA-7 claims, for the period November 16, 2004 to February 21, 2005. By decision dated February 11, 2005, the Office found that appellant was not entitled to wage-loss compensation for any period subsequent to January 4, 2005. On February 23, 2005 appellant, who had retired, elected to receive benefits under the Act for the period November 16, 2004 to January 3, 2005. Also on February 23, 2005, appellant requested a hearing regarding the February 11, 2005 Office decision. He did not file an appeal with the Board from this decision.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁷ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁸ *Donald E. Ewals*, 51 ECAB 428 (2000).

⁹ *Tammy L. Medley*, 55 ECAB ____ (Docket No. 03-1861, issued December 19, 2003); see *Donald E. Ewals*, *supra* note 8.

entitlement to compensation.¹⁰ Furthermore, it is well established that medical conclusions unsupported by rationale are of diminished probative value.¹¹

ANALYSIS

In this case, the Office accepted that appellant sustained an employment-related right lateral epicondylitis. He was terminated for cause effective November 13, 2003, and the dismissal was deemed reasonable by the MSPB. The Office found that the medical evidence of record was insufficient to establish that appellant was totally disabled due to his accepted condition, and other than for a brief period for postoperative recovery, appellant has not received wage-loss compensation.¹²

While appellant contended that his employment injury prevented him from timely performing his work, a reason given for his dismissal, the record indicates that on seven occasions beginning in July 2003, he was assigned tasks that the employing establishment stated normally would take a few hours to perform yet appellant took a number of days to complete. As stated above, the MSPB found the removal reasonable and appellant has submitted no medical evidence to show that, because of the employment injury, he needed such a prolonged time to perform these tasks. The Board therefore finds this argument to be without merit.

The probative medical evidence of record¹³ includes a number of reports from his attending hand surgeon, Dr. Adham, who restricted appellant's work to no overhead activity. As confirmed by employing establishment clinic notes and management, and by appellant's testimony at the hearing he was working modified duty at the time of his dismissal. Until appellant's surgery in March 2004, Dr. Adham continued to advise that appellant could work limited duty. The Board therefore finds that the work tolerance limitations set forth by Dr. Adham would not preclude appellant from performing his limited-duty position.¹⁴ Thus, appellant had no employment-related disability for the period November 14, 2003 to January 21, 2004.

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he was entitled to wage-loss compensation for the period November 14, 2003 to January 21, 2004 causally related to his accepted right lateral epicondylitis.

¹⁰ *William A. Archer*, 55 ECAB ____ (Docket No. 04-1138, issued August 27, 2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

¹¹ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

¹² *Supra* note 4.

¹³ Appellant also submitted medical evidence from Dr. Unsell. This, however, is not relevant to the time period of claimed disability at issue in the decisions before the Board in this case. See *William A. Archer*, *supra* note 10.

¹⁴ See *Laurie S. Swanson*, 53 ECAB 517 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 8, 2004 be affirmed

Issued: August 8, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board