

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN J. PERRY and U.S. POSTAL SERVICE,
POST OFFICE, Wausaukee, WI

*Docket No. 98-1786; Submitted on the Record;
Issued April 12, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that she was totally disabled during intermittent periods from April 1 to July 21, 1995.

The Office of Workers' Compensation Programs initially accepted that appellant's September 1, 1994 employment injury resulted in a fracture of the left ulna, a concussion, lacerations of the left leg, and multiple abrasions. Appellant received continuation of pay from September 2 to October 14, 1994, followed by compensation for temporary total disability until she returned to work on December 2, 1994. Appellant subsequently filed claims for compensation covering the period April 1 to July 21, 1995. During this period appellant took sick leave on April 6 and 7, 1995; leave without pay from April 10 to 28, 1995; annual leave on May 19, May 20 to June 3, 1995; and June 15, 16 and 25, 1995; and sick leave on July 16 and 21, 1995.

By decision dated May 21, 1996, the Office found that the evidence failed to establish that appellant was intermittently totally disabled during the period April 1 to July 21, 1995. Following a hearing held on October 21, 1997, an Office hearing representative, by decision dated February 17, 1998, found that appellant had established that she sustained a right shoulder strain as a result of her September 1, 1994 employment injury, but that she had not established that she was totally disabled during the period from April 1 to July 21, 1995. The Office hearing representative found that the weight of the medical evidence was the report of an Office second opinion specialist, which negated total disability.

Appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based on

a proper factual and medical background, establishing such disability and its relationship to employment.¹

The Board finds that appellant has established that she was totally disabled from April 12 to 28, 1995, but not during the other periods claimed between April 1 and July 21, 1995.²

In a report dated April 12, 1995, appellant's attending Board-certified orthopedic surgeon, Dr. Christopher Van Saders, stated that appellant's "shoulder has been flaring on Mondays after doing heavy lifting," that her pain was in her trapezius muscle and along her shoulder and scapula region, that on examination appellant had "trigger points along the trapezius muscle and along by her scapula, and that "It does get better when she takes it easy and does not do additional lifting." Dr. Van Saders referred appellant to a physical therapist for "additional strengthening exercises for that area," and stated, "I told her to take it easy for three weeks and not go to work." This report is based on an accurate history, contains objective findings on examination, indicates appellant is unable to work in order to "take it easy" on her shoulder which was made more symptomatic by the lifting at work, and relates appellant's disability to a condition accepted by the Office. This report is sufficient to establish that appellant was disabled from the date Dr. Van Saders examined her, April 12 through April 28, 1995, after which appellant returned to work.

For the other dates appellant missed work during the period April 1 to July 21, 1995 -- April 6, 7, 10 and 11, May 19, May 29 to June 3, June 15, 16 and 24 and July 16 and 21, 1995 -- there is no medical evidence that states appellant was totally disabled. The other reports from Dr. Van Saders during this period, which are dated May 17, 22 and 23 and July 20, 1995 do not state appellant was totally disabled for any of the remaining days claimed, nor does an August 8, 1995 report that summarizes Dr. Van Sader's examinations and treatment of appellant from September 1, 1994 to July 20, 1995. The April 7, 1995 report of Dr. George D. Darnell, a chiropractor, states that appellant cannot work for three weeks, but this report does not constitute probative medical evidence, since the chiropractor has not diagnosed a subluxation as demonstrated by x-ray to exist.³

The Office's decisions erred in finding that the report of Dr. Gay R. Anderson, who is Board-certified in orthopedic surgery and in psychiatry, constituted the weight of the medical evidence regarding appellant's disability during the period April 1 to July 21, 1995. Dr. Anderson examined appellant on one occasion, on May 9, 1996, and although this doctor concluded that appellant's complaints in the trapezius and rhomboid areas had nothing to do with her employment injury, from which she had fully recovered, Dr. Anderson's May 9, 1996 report does not address appellant's condition or disability during any period in the past. However, as noted above, appellant has the burden of proving total disability, and for the reasons stated above, has done so only for the period April 12 to 28, 1995.

¹ *David H. Goss*, 32 ECAB 24 (1980).

² Appellant also claimed partial disability beginning December 2, 1994, but the only period of disability adjudicated by the Office in the decisions on appeal was from April 1 to July 21, 1995.

³ *Theresa K. McKenna*, 30 ECAB 701 (1979).

The decision of the Office of Workers' Compensation Programs dated February 17, 1998 is reversed with regard to the period April 12 to 28, 1995, and affirmed with regard to the other periods addressed in that decision.

Dated, Washington, D.C.
April 12, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member