

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of EVA M. McCLINTON and U.S. POSTAL SERVICE,
POST OFFICE, Coppell, Tex.

*Docket No. 96-2557; Submitted on the Record;
Issued August 7, 1998*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether appellant is disabled due to a July 25, 1995 employment injury.

The Board has duly reviewed the case record and concludes that the Office of Workers Compensation Programs properly determined that appellant had no disability due to the July 25, 1995 employment injury.

An employee seeking benefits under the Federal Employees' Compensation Act¹ has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.² Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence.³

Under the Act, the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages.⁵ An employee who has a physical impairment causally related to a federal employment

¹ 5 U.S.C. §§ 8101-8193.

² *Maxine J. Sanders*, 46 ECAB 835, 839 (1995); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

³ *Maxine J. Sanders*, *supra* note 2 at 839; *Debra A. Kirk-Littleton*, 41 ECAB 703, 706 (1990).

⁴ *Maxine J. Sanders*, *supra* note 2 at 840; *Richard T. DeVito*, 39 ECAB 668, 674-75 (1988).

⁵ *Maxine J. Sanders*, *supra* note 2 at 840.

injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act.⁶

The Office accepted appellant's claim for a wrist sprain resulting from her July 25, 1995 employment injury. On April 5, 1996 appellant subsequently filed a claim for disability, Form CA-7, for the period from July 27, 1995 through March 15, 1996. Appellant's supervisor indicated that appellant worked intermittently during that time period. Further, appellant's supervisor stated that based on the employing establishment's medical records, appellant worked "part days" prior to filing her claim due to nonwork-related medical conditions. The medical records to which the supervisor referred indicate that at different times since 1989 appellant was assigned light duty or part-time work due to various medical conditions including temporomandibular joint syndrome for which permanent light duty was recommended in 1989 chronic fibrotic change in the thoracic and lumbar spine which prevented appellant from working from March 30 to July 31, 1992 and blurred vision and dizziness which prevented appellant from working from August 29, 1994 to March 20, 1995 and required that she resume light work. A disability note dated July 25, 1994 stated that appellant could work four hours a day until August 8, 1994 but does not indicate for which medical condition. A computer printout received by the Office on May 21, 1996 indicates that appellant was working part time, approximately four hours or less,⁷ at the time of the July 25, 1995 employment injury.

In support of her claim, appellant submitted medical reports from Dr. Kenneth S. Bayles, her treating physician and an osteopath, and Dr. Richard A. Friedman, an osteopath. In his medical report dated July 27, 1995, Dr. Bayles diagnosed, *inter alia*, acute right wrist strain and indicated that appellant could work with restrictions as indicated in Form CA -17, the duty status report. On Form CA-17 dated August 27, 1995, Dr. Bayles indicated that appellant worked eight hours a day prior to the July 25, 1995 employment injury and after the injury could work four hours a day with lifting, bending and standing restrictions.

In his report dated December 11, 1995, Dr. Friedman considered appellant's history of injury, performed a physical examination, and reviewed a nerve conduction study. He diagnosed, *inter alia*, carpal tunnel syndrome in the right wrist with normal electrodiagnostic study and chronic overuse syndrome. In his report dated January 12, 1996, Dr. Friedman stated that appellant continued working part time, six hours a day of light duty. He prescribed further treatment and that she continue working. In his report dated April 30, 1996, Dr. Bayles stated that appellant continued to have neck, shoulder and right arm and wrist pain and should continue to work four hours a day on a restricted basis.

The Office referred appellant to Dr. Bruce R. Beaver, a Board-certified orthopedist, for a second opinion. In his report dated May 15, 1996, Dr. Beaver considered appellant's history of injury, performed a physical examination and reviewed electrodiagnostic studies which were

⁶ *Id.*; Patricia A. Keller, 45 ECAB 278, 286 (1993).

⁷ Each pay period lasted two weeks and the computer printout indicates that at the time of the July 25, 1995 employment injury appellant was earning \$16.30 an hour. Dividing appellant's hourly salary into the wages received for the pay periods preceding the July 25, 1995 employment injury indicate appellant was working approximately four hours a day or less.

normal. He diagnosed right upper extremity complaints of pain and paresthesias of undetermined etiology. Dr. Beavers opined that appellant had no objective evidence of any pathology, that appellant had completely recovered from her right wrist sprain and was able to work eight hours at her job.

By letter dated June 3, 1996, the Office requested that Dr. Bayles consider that appellant was working four hours a day at the time of her July 25, 1995 employment injury due to a nonwork-related knee condition, review Dr. Beavers' May 15, 1996 opinion, and provide another opinion by June 18, 1996.

By letter dated June 14, 1996, appellant denied ever having a knee problem or seeing a physician for her knee. Appellant also stated that at the time of the July 25, 1995 employment injury, she was able to work eight hours but only worked four hours because the employing establishment could not supply her with work within her restrictions as recommended by her doctor.

By decision dated June 18, 1996, the Office denied appellant's claim, stating that the evidence failed to establish that appellant was disabled due to the July 25, 1995 employment injury. The Office noted that Dr. Bayles did not respond to its June 3, 1996 letter. The record, however, contains a medical report from Dr. Bayles dated June 11, 1996 which was date-stamped received by the Office on June 14, 1996. In his report, Dr. Bayles stated that on August 17, 1995 he recommended that appellant work four hours a day based on her complaints of pain in her right upper extremity. He stated that, contrary to Dr. Beavers' opinion, appellant required restrictions and further treatment. Dr. Bayles recommended that appellant could increase the number of hours she worked to six hours on a trial basis.

In the present case, in its June 18, 1996 decision, the Office did not consider Dr. Bayles' June 11, 1996 medical report even though it was received by the Office on June 14, 1996, as date-stamped, prior to the Office's issuance of its decision. The Office erroneously stated that Dr. Bayles did not respond to its June 3, 1996 letter requesting further information when, in fact, he did. Generally, the Office's failure to consider evidence submitted prior to issuance of its decision requires remand for consideration of that evidence,⁸ but the error is harmless in this case as Dr. Bayles' June 11, 1996 report does not establish that appellant is disabled. Since appellant was working part time at the time of her July 25, 1995 employment injury, Dr. Bayles' opinion that appellant could work four to six hours after her injury does not establish that appellant is disabled as appellant was able to work more hours after her injury than before her injury. Dr. Friedman's December 11, 1995 and January 12, 1996 opinions establish appellant could work six hours a day although Dr. Friedman diagnosed carpal tunnel syndrome which was not an accepted condition. In his May 15, 1996 opinion, Dr. Beaver opined that appellant had recovered from her July 25, 1995 employment injury and could work eight hours a day. Thus, since all the relevant medical evidence of record establishes that appellant could work at least four hours a day after her July 25, 1995 employment injury, appellant had the capacity to earn the same wages after her injury as she did prior to her injury, and therefore is not disabled within the meaning of the Act.

⁸ See *Linda Johnson*, 45 ECAB 439, 440 (1994); *William A. Couch*, 41 ECAB 548, 553 (1990).

The decision of the Office of Workers' Compensation Programs dated June 18, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 7, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member