

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ROSE M. HART and U.S. POSTAL SERVICE,  
POST OFFICE, Pittsburgh, PA

*Docket No. 98-724; Submitted on the Record;  
Issued April 12, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has established that she was disabled for the period September 9 through October 26, 1996, causally related to her accepted employment-related condition of bilateral carpal tunnel syndrome.

On September 25, 1996 appellant, then a 45-year-old letter carrier, filed a claim alleging that on May 15, 1996 she became aware that she had developed carpal tunnel syndrome, causally related to her federal employment. The postmaster noted that appellant stopped work and took sick leave beginning September 6, 1996.

In support of her claim, appellant submitted a June 28, 1996 electromyography (EMG) report, which disclosed bilateral mild to moderate carpal tunnel syndrome. Also submitted was an August 21, 1996 narrative report from Dr. Jerry R. Hershey, a Board-certified family practitioner, which summarized his treatment of appellant from September 24, 1993 and noted that, the June 28, 1996 EMG revealed worsened right carpal tunnel syndrome, left carpal tunnel syndrome unchanged since October 1995, right ulnar neuropathy and early left ulnar neuropathy and opined:

“[Appellant] continues to work but has pain in her knees constant [sic]. She also has problems with the bilateral carpal tunnel syndrome. We have scheduled her for surgery consultation, considering carpal tunnel release surgery, as well as ulnar nerve release surgery. Her continuing to work as a letter carrier can only aggravate the situation, as surgical repair can only provide symptomatic relief, but to escape the consequences of her condition will require cessation of the work activity.”<sup>1</sup>

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<sup>1</sup> No period of disability was identified.

A September 13, 1996 note from appellant's postmaster indicated that appellant was suffering from a number of ailments and that her health was continuing to deteriorate. He indicated that she was not able to perform her job as mail carrier and was "now on sick leave being treated for nerve damage to her elbow [and] knee."<sup>2</sup>

By letter dated December 5, 1996, the Office of Workers' Compensation Programs advised appellant that her claim had been accepted for bilateral carpal tunnel syndrome.

On January 27, 1997 appellant filed a Form CA-7 claim for compensation for disability for the period September 9 through October 26, 1996.<sup>3</sup>

In support appellant submitted a January 31, 1997 report from Dr. Hershey, which reviewed her treatment history dating from 1989 and which opined that the development of appellant's carpal tunnel syndrome problems resulted from her continuing to work as a letter carrier.<sup>4</sup> He recommended release surgery of both elbows and both wrists and removal from her letter carrier duties.

Also submitted was a disability certificate from Dr. E. Phillips Polack, a Board-certified plastic and hand surgeon, which indicated that appellant was under his care from September 5 to October 28, 1996 "and was totally incapacitated during this time." He indicated that appellant could return to regular duty on October 28, 1996.

By letter dated May 27, 1997, the Office noted its receipt of Dr. Polack's disability certificate, noted that, although it indicated a period of disability, it did not indicate what specific condition caused the total incapacitation for this period and requested that Dr. Polack complete an enclosed Form CA-20 attending physician's report within 15 days. The form was not completed as requested.

On August 20, 1997 appellant filed a claim for recurrence of disability commencing July 20, 1997.<sup>5</sup>

By decision dated September 24, 1997, the Office denied appellant's claim for disability for the period September 9 through October 26, 1996, finding that she had failed to submit any medical evidence to support that she was totally disabled for that time period, causally related to her accepted employment-related condition of bilateral carpal tunnel syndrome. The Office advised appellant that it was her responsibility to ensure that the requested medical evidence was submitted. Appellant was also advised that if she did not agree with this decision she should follow the appeal rights outlined in the attached instructions.

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<sup>2</sup> The postmaster did not state that appellant was out of work at that time due to bilateral carpal tunnel syndrome.

<sup>3</sup> A leave record demonstrating sick leave from September 9 through October 26, 1996 was additionally submitted.

<sup>4</sup> Dr. Hershey did not discuss any period of disability due to the carpal tunnel syndrome problems.

<sup>5</sup> As no final decision has been made by the Office on this claim, it is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

On October 27, 1997 the Office received a packet of medical evidence without a cover letter or related correspondence from appellant identifying or requesting any specific action that she desired.<sup>6</sup>

By letter dated October 28, 1997, the Office acknowledged receipt of the medical evidence submitted following the September 24, 1997 final decision and advised appellant that if she wished to dispute that decision she must follow the appeal rights, which accompanied it. The Office advised appellant that it could take no action at that time, but noted that the submitted material was being placed in her case file so that it would be available if and when she appealed the Office decision.

On November 3, 1997 further medical evidence was submitted. Accompanying this evidence was an October 20, 1997 letter from appellant requesting buy back of the sick leave that was used from September 6 to October 25, 1996.<sup>7</sup>

By letter dated November 25, 1997, the Office acknowledged its receipt of the October 20, 1997 letter and accompanying medical evidence and advised appellant that she must again review the appeal rights that were included with the September 24, 1997 decision. The Office again advised that it could take no action until appellant informed it in writing of which of the appeal options she wished to pursue.

By letter to the Board dated December 1, 1997 and postmarked December 5, 1997, appellant expressed her wish to “ask for a review of the written record and reconsideration of the decision of September 24, 1997.”<sup>8</sup> She also requested leave buy back for the period in question.

Further medical evidence was received by the Office on December 4, 1997.

The Board date stamped as received, took jurisdiction of the case and docketed appellant’s appeal on December 11, 1997.

Subsequently, on February 3, 1998 the Branch of Hearings and Review issued a nonmerit decision finding that appellant’s request for a review of the written record was untimely and denying the request on the grounds that the issue in the case could equally well be addressed by requesting reconsideration from the district Office and by submitting pertinent evidence not previously considered.<sup>9</sup>

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<sup>6</sup> As this evidence was not reviewed by the Office for a formal final decision on its merits, it is not now before the Board on this appeal; *see* 20 C.F.R. § 501.2(c).

<sup>7</sup> However, reconsideration of the September 24, 1997 Office decision was not requested.

<sup>8</sup> An identical letter was submitted to the Branch of Hearings and Review and was stamped as received on both December 8 and 9, 1997.

<sup>9</sup> As the Board took jurisdiction of this case and the issue in question on December 11, 1997, the Office’s February 3, 1998 nonmerit decision is null and void for lack of jurisdiction.

The Board finds that appellant has failed to establish that she had disability for the period September 9 through October 26, 1996, causally related to her accepted employment-related condition of bilateral carpal tunnel syndrome.

A claimant seeking compensation under the Federal Employees' Compensation Act<sup>10</sup> has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.<sup>11</sup> The claimant must establish that she sustained an injury or condition in the performance of duty as alleged. The claimant also must establish that she has disability, causally related to the accepted employment injury or condition.<sup>12</sup> As part of this burden, appellant must submit rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, showing a causal relationship between her period(s) of disability and the accepted employment injury or condition.<sup>13</sup>

As used in 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.<sup>14</sup> Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>15</sup> An employee who has a physical impairment causally related to her federal employment, but who nonetheless has the capacity to earn the wages she 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.<sup>16</sup> When, however, the medical evidence establishes that the residuals of an employment-related injury or condition are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>17</sup> Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages loss.<sup>18</sup>

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<sup>10</sup> 5 U.S.C. §§ 8101-8193.

<sup>11</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>12</sup> *See Elaine Pendleton*, 40 ECAB 1143 (1989); *Daniel R. Hickman*, 34 ECAB 1220 (1983).

<sup>13</sup> *See Bertha L. Arnold*, 38 ECAB 282 (1986); *Tracey Smith-Cashen*, 38 ECAB 568 (1987); *see also* 20 C.F.R. § 10.110(a).

<sup>14</sup> *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

<sup>15</sup> *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).

<sup>16</sup> *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).

<sup>17</sup> *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

<sup>18</sup> *George W. Coleman*, 38 ECAB 782 (1987).

In the instant case, appellant did not submit, prior to the Office's September 24, 1997 decision, rationalized medical opinion evidence, based upon a complete and accurate factual and medical background, which identified her period(s) of disability and showed a causal relationship between her period(s) of disability and the accepted employment injury or condition.

The only medical evidence submitted to the record prior to the Office's September 24, 1997 decision consisted of a June 28, 1996 EMG report, which did not identify or address any periods of disability, two narrative reports dated August 21, 1996 and January 31, 1997 from Dr. Hershey, which did not identify or address any periods of disability due to bilateral carpal tunnel syndrome and a disability certificate from Dr. Polack identifying a period of disability from September 5 to October 28, 1996 but not disclosing to what this period of disability was due.<sup>19</sup> The first three reports have no probative value on the issue of disability as they did not address disability and the disability certificate is of insufficient probative value to establish a period of disability causally related to the accepted bilateral carpal tunnel syndrome condition, as it identified no cause for the reported disability period. Therefore, these reports did not establish that appellant was totally disabled for the period September 5 to October 28, 1996, causally related to her accepted bilateral carpal tunnel syndrome, as the Office properly ascertained.

Following the Office's September 24, 1997 decision, further medical evidence was submitted to the Office, however, as none of this evidence has been reviewed on its merits by the Office for a formal final decision, it cannot now to be considered by the Board.<sup>20</sup>

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<sup>19</sup> The statement from the postmaster regarding appellant's disability is not considered to be medical evidence as it was rendered by a layman; *see George E. Williams*, 44 ECAB 530 (1993); *Sheila Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992).

<sup>20</sup> *See* 20 C.F.R. § 501.2(c). Further, the Office's February 3, 1998 decision was not on the case's merits and was null and void for lack of jurisdiction.

Accordingly, the decision of the Office of Workers' Compensation Programs dated September 24, 1997 is hereby affirmed.

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

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member