

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL HOLLARS and DEPARTMENT OF AGRICULTURE,
U.S. FOREST SERVICE, FREMONT NATIONAL FOREST, Lakeview, OR

*Docket No. 98-73; Submitted on the Record;
Issued March 10, 2000*

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for intermittent periods of compensation.

On July 25, 1978 appellant, then a 28-year-old forestry technician, was helping to fight a forest fire when he twisted his right knee while walking down a slope. He returned to work shortly thereafter. On July 1, 1981 appellant filed a claim for strain of the Achilles tendon and the calf muscle of the right leg, complicated by phlebitis. On September 20, 1983 he filed a claim for recurrence of disability due to swelling of the right knee. On November 28, 1983 appellant filed a claim for swelling of the right knee which he related to the July 25, 1978 employment injury. On February 13, 1984 he underwent surgery on his right knee. The surgery showed a torn medial meniscus, early, post-traumatic degenerative changes and incompetent anterior cruciate ligament. Dr. Benjamin F. Balme, an orthopedic surgeon, performed a medial meniscectomy. On July 18, 1985 appellant had a recurrence of thrombophlebitis of the right leg. He had subsequent recurrences of disability due to thrombophlebitis. On July 20, 1993 appellant underwent additional arthroscopic surgery on his right knee. On May 10, 1994 he underwent valgus osteotomy surgery of the right leg. On May 21, 1995 appellant filed a claim for greater saphenous vein thrombosis of the left leg. The Office accepted appellant's claims for torn medial meniscus, thrombophlebitis of the right leg, post-traumatic osteoarthritis of the right knee, and thrombophlebitis of the left leg.

Appellant filed claims for intermittent periods of disability in which he had taken leave without pay from work. On April 15, 1996 appellant assumed a new position as an administrative assistant. In an October 31, 1996 letter, a rehabilitation specialist indicated that he was closing appellant's rehabilitation file because appellant had returned to work in a position that was within his physical capacity. On August 8, 1997 appellant filed a claim for 36 hours of intermittent disability for leave without pay taken between March 30 and July 19, 1997.

In an August 21, 1997 decision, the Office denied appellant's claim for 36 hours of intermittent disability. The Office noted that medical evidence supported that appellant had medical appointments for 17 hours of intermittent disability during the period in question. The Office found, however, that appellant had no compensable disability for the period March 30 through July 19, 1997. The Office indicated that when appellant's actual earnings exceeded the current salary of the same grade and step of his former position, he had no compensable disability. The Office stated that, at the time of the July 25, 1978 employment injury, appellant was a GS-5, step 2 forestry technician earning \$10,291.00 a year or \$197.00 a week. The Office noted that the current salary for that grade and step was \$21,141.00 a year or \$406.56 a week. The Office found that, during the period March 30 through July 19, 1997, appellant was earning \$7,694.52, an average of \$641.21 a week which exceeded the \$406.56 current weekly pay of his former position. The Office, therefore, concluded that appellant had no compensable disability during the period in question.

The Board finds that the Office improperly denied appellant's claim for intermittent disability for the period March 30 through July 19, 1997.

The Office's analysis to deny appellant's claim was the analysis used in evaluating a claimant's loss of wage-earning capacity.¹ However, in this case, appellant's claim was not for a loss of wage-earning capacity. Appellant had returned to work at a different position. His subsequent claims, however, were not based on a claim that, due to his employment injuries, he was partly disabled and was not able to perform the duties of the former position. Appellant was seeking compensation for those periods in which he took leave without pay due to the effects of his employment injuries and sought medical treatment. The Board has long recognized that, under section 8103² payment of expenses incidental to the securing of medical services encompasses payment for loss of wages incurred while obtaining medical services. An employee is entitled to disability compensation for loss of wages incidental to treatment for an employment injury.³ In this case, appellant was seeking compensation for loss of wages for 36 hours of leave without pay which he indicated was used in obtaining medical treatment for the effects of his employment injuries. Appellant is entitled to compensation for those hours of leave without pay that are shown to have been taken for treatment for the effects of the accepted employment-related conditions. The Office therefore used an improper basis for denying appellant's claim for intermittent periods of disability. The case will be returned to the Office for payment of compensation for the 17 hours for which the Office has accepted that appellant had intermittent disability. The Office shall issue a *de novo* decision on whether appellant has established that he is entitled to compensation for the other 19 hours of intermittent disability sought for the period March 30 through July 19, 1997.

¹ *Albert C. Shadrick*, 5 ECAB 376 (1953).

² 5 U.S.C. § 8103.

³ *Antonio Mestres*, 48 ECAB 139 (1996); *Henry Hunt Searls, III*, 46 ECAB 192 (1994); *Mrytle B. Carlson*, 17 ECAB 644 (1966). This concept is recognized in the Office's procedures. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901.16(a) (December 1995).

The decision of the Office of Workers' Compensation Programs, dated August 21, 1997, is hereby reversed and remanded for further action consistent with this decision.

Dated, Washington, D.C.
March 10, 2000

David S. Gerson
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member