

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ELLA M. SIMS-GALE and DEPARTMENT OF AGRICULTURE,  
NATIONAL FINANCE CENTER, New Orleans, LA

*Docket No. 98-2020; Submitted on the Record;  
Issued March 1, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
BRADLEY T. KNOTT

The issue is whether appellant was entitled to compensation for total disability for intermittent periods between September 8 and 22, 1997, causally related to her July 22, 1997 employment injury.

On July 22, 1997 appellant, then a 44-year-old payroll technician, filed a claim alleging that on that date she strained her lower back when she picked up a box of printer paper. The Office of Workers' Compensation Programs accepted that appellant sustained a lumbar strain.

By report dated July 23, 1997, Dr. J. Terry Segura, a Board-certified occupational medicine specialist, indicated that appellant could resume light work that date, and would be partially disabled from that date to July 31, 1997. Dr. Segura noted restrictions as including no lifting over 15 pounds, no bending, no climbing ladders and no prolonged sitting.

By report dated July 24, 1997, Dr. Segura indicated that appellant could return to work that date with restrictions on lifting over 15 pounds, on repetitive bending and on prolonged sitting.

On July 25, 1997 Dr. David M. Jarrott, a Board-certified neurosurgeon, indicated that appellant needed complete bed rest for one week.

Appellant received continuation of pay from July 23 through September 8, 1997.

By report dated September 30, 1997, Dr. Jarrott diagnosed L4-5 herniation (degenerative prolapse) due to injury, noted that appellant was partially disabled from April 21 to September 20, 1997, and indicated that appellant had been advised that she could return to light work on September 20, 1997 with enumerated restrictions.

On December 9, 1997 appellant elected Federal Employees' Compensation Act<sup>1</sup> compensation to repurchase leave used for medical care resulting from her accepted condition.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

She identified 35 hours of leave between September 8 and 12, 1997, 45 hours between September 15 through 19, 1997 and 1 hour on September 22, 1997, and noted the reason for use of leave as “D[octo]r’s orders.”

By letter dated December 29, 1997, the Office advised appellant that there was no medical evidence of record to support that she was totally disabled from work due to her July 22, 1997 lumbar strain during the period September 8 through 22, 1997. It requested that she submit medical evidence supportive of total disability.

Nothing further was submitted.

By decision dated March 23, 1998, the Office rejected appellant’s claim for compensation for 81 hours from September 8 through 22, 1997, finding that there was no medical evidence supporting that appellant was totally disabled for work during those hours. The Office found that, according to the medical reports of record, appellant was partially disabled from April 2 through September 20, 1997 and from July 23 to 31, 1997 and able to work with restrictions.

By letter dated April 1, 1998, appellant requested reconsideration of the March 23, 1998 decision and alleged that because the December 30, 1997 letter bore the incorrect address she did not receive it and therefore could not submit the required medical evidence.<sup>2</sup> In support of her request, appellant submitted an April 1, 1998 report from Dr. Jarrott which stated that she was seen on August 4, 1997, was advised to lose weight and was advised to have semibed rest at home for three weeks.<sup>3</sup> By letter dated April 27, 1998, the Office advised appellant that further medical evidence was required, and it advised that Dr. Jarrott should submit his treatment notes during the period from July 22 through September 22, 1997.

Nothing further was submitted.

By decision dated May 26, 1998, the Office denied modification of the March 23, 1998 decision finding that the evidence submitted was insufficient to warrant modification. The Office found that Dr. Jarrott’s additional report did not support total disability for the period September 8 through 22, 1997.

The Board finds that appellant has failed to establish that she was entitled to compensation for total disability during the period September 8 through 22, 1997.

A person who claims benefits under the Act has the burden of proof in establishing the essential elements of his or her claim, including the fact that an injury occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.<sup>4</sup>

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<sup>2</sup> The Board notes, however, that the March 23, 1998 decision was mailed to that same address, and appellant obviously received it as she was appealing it eight days later.

<sup>3</sup> This would have been for the period through August 25, 1997, a period during which appellant was still receiving continuation of pay.

<sup>4</sup> See *Robin L. Brainard*, 43 ECAB 329 (1991); *Dean E. Pierce*, 40 ECAB 1249 (1989); *Daniel R. Hickman*, 34 ECAB 1220 (1983).

In the instant case, although appellant established that she sustained a back injury, lumbar strain, in the performance of duty on July 22, 1997, she did not establish that the injury resulted in total disability for employment during the period September 8 through 22, 1997.<sup>5</sup>

Dr. Segura indicated as early as July 23, 1997 that appellant could resume light work with certain restrictions, and opined that she would be partially disabled from that date until July 31, 1997. He never found that appellant was totally disabled from all employment.

Dr. Jarrott opined, on July 25, 1997, his most contemporaneous report to the date of injury, that appellant needed complete bed rest for one week, which would have been through August 1, 1997. In his later, less contemporaneous September 30, 1997 report, Dr. Jarrott opined that appellant was partially disabled from April 21 to September 20, 1997 and could return to light work on September 20, 1997 with enumerated restrictions. At no time did he indicate that appellant was totally disabled after August 1, 1997. This report is of diminished probative value as Dr. Jarrott found partial injury-related disability three months prior to appellant's injury, and hence his report was based upon an inaccurate factual and medical background.<sup>6</sup> This report is also of diminished probative value as Dr. Jarrott was inexplicably inconsistent with his earlier July 25, 1997 report in which he opined that appellant needed a week of bed rest, when he opined that appellant was only partially disabled for the period July 25 to August 1, 1997. Thereafter on April 1, 1998, almost eight months after appellant's injury, Dr. Jarrott again changed his opinion on appellant's period of total disability, stating that when he examined appellant on August 4, 1997 she required three weeks of semibed rest. However, even considering this period as being a period of total disability, it only runs through August 25, 1997 and does not support total disability during the period September 8 through 22, 1997.

The Board has explained that those medical reports which are most contemporaneous with the date of injury are the most reliable indicators of the period of disability.<sup>7</sup> In this case, Dr. Segura, whose reports were the most contemporaneous with the injury, found that appellant

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<sup>5</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. *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). Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages; 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). An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or 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; 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). When, however, the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in his or her employment, he or she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity. *Bobby W. Hornbuckle*, 38 ECAB 626 (1987). Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost. *George W. Coleman*, 38 ECAB 782 (1987).

<sup>6</sup> See *Daniel J. Overfield*, 42 ECAB 718 (1991) (medical opinions based upon an incomplete or inaccurate factual background are entitled to little probative value).

<sup>7</sup> See *Robin L. Brainard*, 43 ECAB 329 (1991); *Christine M. Yuknas*, 33 ECAB 424 (1982).

could return to light duty on July 23, 1997. Dr. Jarrott found on July 25, 1997, his most contemporaneous report, that appellant needed bed rest for one week only. Therefore, these reports are the most highly probative as to appellant's state of disability following her July 22, 1997 injury, and support that appellant was not disabled after August 1, 1997, due to her accepted employment injury. Less contemporaneous reports were later submitted by Dr. Jarrott which identified an extended period of partial disability through September 20, 1997 and a need for semibed rest through August 25, 1997; however, no period of total disability was identified, and these reports were of diminished probative value relative to his more contemporaneous report and due to the factual basis being inaccurate, and due to the lapse of time. Consequently, these reports are insufficient to establish that appellant was totally disabled for employment during the period September 8 through 22, 1997, such that she would be entitled to leave buy back.

Appellant was advised that she needed to submit rationalized medical evidence based upon objective findings during a physical examination, identifying total disability for the period claimed; however, she failed to submit such rationalized medical evidence for the period September 8 through 22, 1997. Accordingly, she has failed to meet her burden of proof to establish total disability for work during that period.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 26 and March 23, 1998 are hereby affirmed.

Dated, Washington, D.C.  
March 1, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Bradley T. Knott  
Alternate Member