

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DENNIS K. ZOSS and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Longmont, CO

*Docket No. 00-2689; Submitted on the Record;  
Issued July 9, 2001*

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DECISION and ORDER

Before BRADLEY T. KNOTT, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay for the period November 8 through 17, 1999; and (2) whether the Office properly denied appellant's request for reconsideration.

The Board has duly reviewed the case record in this appeal and finds that the Office properly denied appellant's claim for continuation of pay for the period November 8 through 17, 1999.

The Federal Employees' Compensation Act,<sup>1</sup> provides for payment of continuation of pay, not to exceed 45 days, to an employee "who has filed a claim for a period of wage loss due to a traumatic injury with his immediate superior on a form approved by the Secretary of Labor within the time specified in section 8122(a)(2) of this title."<sup>2</sup>

An employee seeking benefits under the Act 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 a 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 is causally related to the employment injury.<sup>3</sup>

As used in the Act the term "disability" means incapacity because of an employment injury to earn wages, which the employee was receiving at the time of injury, *i.e.*, a physical

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> 5 U.S.C. § 8118(a).

<sup>3</sup> See *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

impairment resulting in loss of wage-earning capacity.<sup>4</sup> The general test for determining loss of wage-earning capacity is whether an injury-related impairment prevents the employee from performing the kind of work he was performing when injured.<sup>5</sup> In other words, if an employee is unable to perform the required duties of the job, in which he was employed when injured, the employee is disabled.

On November 8, 1999 appellant, then a 42-year-old air traffic controller, filed a traumatic injury claim alleging that on that day he was struck by glass when a rock was thrown through a window and sustained an emotional condition as a result of this incident.

By decision dated December 22, 1999, the Office accepted appellant's claim for an adjustment disorder with mixed emotions, which resolved by November 18, 1999.

In a second decision dated December 22, 1999, the Office determined that appellant was not entitled to continuation of pay for the period November 8 to 17, 1999 because he had failed to provide medical evidence establishing that he was totally disabled during that period.

By letter dated January 11, 2000, appellant requested reconsideration and submitted additional evidence.

By decision dated January 28, 2000, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted in support of the request was cumulative, repetitious and immaterial.

In a report dated November 10, 1999, Dr. David R. Ferguson related that on November 8, 1999 someone threw a rock through a window above appellant's head as he walked down a stairway and he became agitated and angry because he thought the act was intentional. Dr. Ferguson diagnosed mild adjustment disorder related to the incident on November 8, 1999. He stated that appellant was able to return to work.

In a report dated November 16, 1999, Dr. Ferguson related that appellant had returned to work on November 11, 1999 but left after working two and one-half hours and did not return to work. He recommended that appellant return to work as soon as possible and seek counseling in order to develop coping skills to deal specifically with anger, frustration and self-restraint.

In a report dated November 18, 1999, Dr. Ferguson indicated that appellant could return to work as of that date.

In his reports, Dr. Ferguson did not address the issue of whether appellant was totally disabled from November 8 through 17, 1999 due to his employment injury. As appellant failed to provide medical evidence establishing that his claimed disability from work for the period November 8 through 17, 1999 was causally related to his November 8, 1999 employment injury, the Office properly denied his claim for continuation of pay.

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<sup>4</sup> See *Debra A. Kirk-Littleton*, 41 ECAB 703, 706 (1990).

<sup>5</sup> See *Gary L. Loser*, 38 ECAB 673, 679 (1987).

The Board further finds that the Office properly denied appellant's request for reconsideration.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.<sup>6</sup> When an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.<sup>7</sup>

In support of his January 11, 2000 request for reconsideration, appellant submitted Dr. Ferguson's November 10 and 16, 1999 reports, in which as noted above, he related that on November 8, 1999 someone threw a rock through a window above appellant's head, diagnosed mild adjustment disorder and stated that appellant was able to return to work. However, Dr. Ferguson did not provide an opinion of whether appellant was disabled from November 8 through 17, 1999, due to his employment injury. As Dr. Ferguson's reports did not address the critical issue in this case whether appellant was disabled from November 8 through 17, 1999 due to his employment injury, they do not constitute relevant and pertinent evidence not previously considered by the Office. As appellant did not show that the Office erroneously applied or interpreted a specific point of law, did not advance a relevant legal argument not previously considered by the Office and did not submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied his request for reconsideration.

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<sup>6</sup> 20 C.F.R. § 10.606(b)(2) (1999).

<sup>7</sup> 20 C.F.R. § 10.608(b) (1999).

The January 28, 2000 and December 22, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
July 9, 2001

Bradley T. Knott  
Alternate Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member