

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HARRISON E. BLACK and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NW

*Docket No. 00-1088; Submitted on the Record;
Issued June 20, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant is entitled to compensation for intermittent periods between August 18, 1996 through August 15, 1997 due to his accepted employment injuries sustained on May 20 and 30, 1996.

On June 4, 1996 appellant, then a 61 year-old city carrier, filed a traumatic injury claim alleging that he injured his right shoulder on May 20, 1996 when he lifted a heavy tray of mail and again on May 30, 1996 when he reached back to close a sliding door.¹ The Office of Workers' Compensation Programs accepted the claim for right shoulder strain and noted the date of injury as May 20, 1996. Appellant was off work for the period June 4 through 8, 1996 and returned to light-duty work on June 10, 1996.

On August 6, 1997 appellant filed a claim for compensation (Form CA-7) for an unspecified number of hours for the period August 18, 1996 through August 6, 1997.² On the back of the form the period of compensation was noted as August 16, 1996 through August 15, 1997 with no specific hours indicated.

On October 23, 1997 appellant filed a traumatic injury claim alleging that on October 10, 1997 he injured his shoulders when he lifted a heavy tray of mail.³ The Office accepted the claim for tendinitis left shoulder and aggravation of tendinitis right shoulder.

¹ This was assigned claim No. 16-0280738.

² Appellant wrote "indefinite" above the date August 6, 1997.

³ This was assigned claim No. 16-0307722. On December 12, 1997 the Office combined appellant's May 20, 1996 claim, which had been assigned claim No. 16-0280738, with his October 10, 1997 claim. The master number for both cases was No. 16-0307722.

On December 23, 1997 the Office calculated that appellant claimed 352.30 hours of compensation for hours of time lost during the period August 18, 1996 through August 15, 1997.

In a letter dated January 2, 1998, the Office advised appellant that the record contained no medical evidence to support compensation for the 352 hours of leave without pay claimed for the period August 18, 1996 through August 15, 1997. The Office informed appellant that he had 20 days to submit medical evidence supporting disability or medical treatment for any of the dates claimed and if no evidence was received by January 22, 1998 his compensation claim would be denied.

On March 26, 1998 the Office denied appellant's claim as no evidence had been submitted to support his claim for compensation during the period August 18, 1996 through August 15, 1997.

Appellant requested an oral hearing by letter dated April 6, 1998.

A hearing was held on July 21, 1999, at which appellant testified and submitted evidence including progress notes, duty status reports and therapy treatment for the period August 20, 1996 through February 21, 1997 and functional capacity evaluation forms and duty status reports for the period July 23, 1996 through March 19, 1997.

Subsequent to the hearing appellant submitted a copy of his physical therapy schedule for the period January 3, 1997 through April 9, 1998, medical notes from November 6, 1996 through February 21, 1997, completed CA-7a forms dated July 13 and August 20, 1999 and an August 4, 1999 report from Dr. Charles Kunkel. In an August 4, 1999 report, Dr. Kunkel noted:

“He has been seen primarily by Dr. Tapia who prescribed extensive physical therapy and pool therapy treatments. [Patient's] records support this point. Later required [left] rotator cuff repair January 1998. Now has pain and crepitation in both shoulders”

By decision dated October 12, 1999, the hearing representative found that appellant had not established that his disability during the period August 18, 1996 through August 15, 1997 was causally related to his accepted May 5, 1996 employment injury.

The Board finds that appellant has failed to establish that he is entitled to compensation for intermittent periods between August 18, 1996 through August 15, 1997 due to his accepted employment injuries sustained on May 20 and 30, 1996.

A person who claims benefits under the Federal Employees' Compensation 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.⁴

⁴ 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 he sustained a right shoulder strain, in the performance of duty on May 20 and 30, 1996, he did not establish that the injury resulted in disability for employment during the period August 18, 1996 through August 15, 1997.⁵

In support of his claim for disability, appellant submitted progress notes, duty status reports, therapy treatment for the period June 4, 1996 through February 21, 1997 and functional capacity evaluation forms and duty status reports for the period July 23, 1996 through March 19, 1997, a copy of his physical therapy schedule for the period January 3, 1997 through April 9, 1998, medical notes from November 6, 1996 through February 21, 1997 by a physical therapist, completed duty status reports (Form CA-17), a form CA-7 dated August 7, 1996 and CA-7b dated July 13, 1999 and an August 4, 1999 report from Dr. Kunkel. He noted he had reviewed appellant's file, which supported that he had extensive physical and pool therapy ordered by Dr. Tapia. This report is insufficient to meet appellant's burden as Dr. Kunkel did not provide any reasoning explaining how and why appellant required the physical therapy nor does the record contain a report from Dr. Tapia supporting that he prescribed physical and pool therapy for appellant during the period August 18, 1996 through August 15, 1997. Furthermore, in a progress note dated August 20, 1996, it was noted that appellant injured his right shoulder when lifting a tray of mail on August 19, 1996.

As appellant has failed to submit a well-reasoned narrative medical opinion explaining how his right shoulder strain required physical and pool therapy during the period August 18, 1996 through August 15, 1997, he has not met his burden of proof and the Office properly denied his claim.

⁵ 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).

The October 12, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 20, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member