

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY ANN SHUMAKER and U.S. POSTAL SERVICE,
POST OFFICE, Las Vegas, NV

*Docket No. 01-528; Submitted on the Record;
Issued October 1, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant was disabled from work on or after December 2, 1999 causally related to her federal employment.

On November 16, 1999 appellant, then a 37-year-old letter carrier, filed a notice of traumatic injury alleging that on that date she twisted her back and experienced low back and radiating leg pain while in the performance of duty. The Office of Workers' Compensation Programs accepted the claim for herniated nucleus pulposus, L5-S1. Appellant was off work following the injury and received continuation of pay. On December 2, 1999 she worked a half day of limited duty with specified work restrictions, however, was suspended without pay later that day, pending investigation due to administrative reasons.

On December 14, 1999 appellant filed Form CA-7 requesting wage-loss compensation beginning December 3, 1999 to the present.

The record contains duty status reports from Dr. Edward Fishman, an attending physician, which noted that he examined appellant from November 16 to December 1, 1999 for a work-related lumbar sprain. He diagnosed the herniated disc on November 30, 1999 following a magnetic resonance imaging scan. Dr. Fishman released appellant for work on December 1, 1999 with the following work restrictions: no street delivery, climbing, kneeling, bending, stooping, twisting, pulling, pushing, operating machinery, driving, lifting more than five pounds; no sitting for more than four hours or standing for more than eight hours.

On December 30, 1999 the Office received information from the employing establishment that appellant was being investigated for performing various activities while off work during continuation of pay status, which violated her work restrictions. Appellant was allegedly observed performing such activities as driving a private vehicle, walking her dog, shopping for groceries, stooping, bending, twisting and doing laundry. The employing

establishment reported that on January 3, 2000 appellant was terminated due to unacceptable conduct and violating her work restrictions while in a continuation of pay status.

In a memorandum to the file, the Office noted that light-duty work conforming to appellant's restrictions was accommodated and available to appellant had she not been suspended and subsequently dismissed.

On January 24, 2000 the Office denied appellant's CA-7 claim for disability compensation effective December 2, 1999. The Office found that the medical evidence of record established that effective December 2, 1999 she was no longer disabled and could resume full-time restricted employment.

On February 23, 2000 appellant requested an oral hearing and submitted additional evidence. She contended that allegations made by the employing establishment were determined to be unfounded and that at no time did she violate work restrictions or act inappropriately as erroneously charged by the employing establishment. Appellant further submitted documentation which indicated that, as of June 29, 2000, a settlement had been reached with the employing establishment regarding her position. The settlement documentation contained a statement from Dr. Fishman, which indicated that upon review of appellant's activities during her continuation of pay status, she had not performed any activities inconsistent with her injuries. He further indicated that, although he restricted appellant's work activity, he could not limit what his patients do outside of work. Dr. Fishman noted that appellant had never requested to be off work completely and that he only placed her off work until he could fully diagnose her condition. The settlement documentation noted that, if appellant provided current medical restrictions to the employing establishment, she would be allowed to return to work immediately with pay for all lost time from November 29, 1999 until such date of return.

Following a hearing held July 19, 2000, an Office hearing representative affirmed the prior decision finding that appellant failed to establish disability for work after December 2, 1999.

The Board finds that appellant has failed to establish that her disability for work after December 2, 1999 is causally related to the accepted employment injury of November 16, 1999.

Appellant has the burden of establishing by the weight of reliable, probative and substantial evidence that the period of claimed disability was caused or adversely affected by the employment injury. As part of this burden, she must submit rationalized medical opinion evidence based on a complete factual and medical background showing a causal relationship between her disability and the federal employment. The fact that the condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.¹

¹ See *Nicolea Brusco*, 33 ECAB 1138 (1982).

Under the Federal Employees' Compensation Act,² the term "disability" means incapacity, due to an accepted employment-related injury, to earn the wages that the employee was receiving at the time of the injury.³ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages.⁴ An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn 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.⁵ 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 her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.⁶ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not upon actual wages lost.⁷

In this case, the evidence of record does not show that appellant was disabled from work after December 2, 1999 because of her accepted condition of herniated nucleus pulposus at L5-S1. Appellant returned to work for a half day on December 2, 1999 following medical release before filing a claim for wage-loss compensation. The record indicates that appellant was suspended without pay pending investigation of her activity while in continuation of pay status and notwithstanding her administrative suspension beginning December 2, 1999 limited-duty work conforming to her medical restrictions was accommodated and remained available to appellant.

Appellant filed a grievance concerning the investigation by the employing establishment of her activities while in continuation of pay status, which resulted in a settlement that allowed appellant to return to work with lost wages. As the Office correctly addressed in its October 17, 2000 decision, the employing establishment did not err in placing appellant in an off-duty status during the investigation and the decision settling appellant's grievance made no finding or admission of error or abuse on the part of the employing establishment.

The medical evidence submitted in support of the claim for disability beginning December 2, 1999 does not establish a requisite causal relationship between appellant's disability for work and her federal employment. In this regard, the report of Dr. Fishman does not support disability for work on or after December 1, 1999. As the evidence of record is devoid of a physician's opinion establishing her disability that date to her accepted injury, appellant is not entitled to compensation for disability on or after December 2, 1999.

² 5 U.S.C. §§ 8101-8193.

³ *Maxine J. Sanders*, 46 ECAB 835, 839-40 (1995).

⁴ *See id.* at 840.

⁵ *Id.*

⁶ *Gary L. Loser*, 38 ECAB 673 (1987).

⁷ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

The decisions of the Office of Workers' Compensation Programs dated October 17 and January 24, 2000 are affirmed.

Dated, Washington, DC
October 1, 2001

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member