

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARCELLA J. LUMETTA and U.S. POSTAL SERVICE,
POST OFFICE, Roseville, MI

*Docket No. 02-454; Submitted on the Record;
Issued July 24, 2002*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's claim for continuation of pay from December 27, 2000 through January 10, 2001.

On December 21, 2000 appellant, then a 45-year-old letter carrier, filed a traumatic injury claim and claim for continuation of pay alleging that on December 15, 2000 she injured her left knee and elbow when she slipped and fell while going down stairs at work. The Office accepted appellant's claim for left knee contusion, left knee strain and effusion of the lower left leg joint. Appellant stopped work on December 16, 2000 with intermittent periods of disability.

Dr. Andrew Shinar, a Board-certified orthopedic surgeon, treated appellant for her knee condition following the injury and assessed her work capabilities. In his medical note dated December 27, 2000, Dr. Shinar stated: "Her job does not have any real light duty per [appellant] and thus she will stay off work for the next two weeks."

In a letter dated December 28, 2000, the Office informed Dr. Shinar that it had reviewed medical documentation submitted for appellant, which indicated his recommendation of total disability until January 10, 2001. The Office further advised Dr. Shinar that the employing establishment was prepared to offer appellant a limited-duty assignment and requested his opinion as to whether appellant was capable of working full time in a limited-duty capacity.

In a letter dated January 24, 2001, the Office advised appellant that the employing establishment controverted the claim for continuation of pay beyond December 27, 2000. The employing establishment asserted that appellant misled Dr. Shinar by informing him that light duty was unavailable to her following her injury when a rehabilitative position was in fact available. The Office made reference to Dr. Shinar's note dated December 27, 2000 and requested that appellant explain why she told her physician that the employing establishment had no light duty. The Office further advised appellant to notify her physician that light duty was in fact available and request that he provide a report supporting disability beyond December 27, 2000 and specify his recommended work restrictions.

In a letter dated February 14, 2001, appellant explained to the Office that, at the time of her December 27, 2000 appointment with Dr. Shinar, she was still experiencing pain and had difficulty walking. She stated that she expressed her fears of walking in harsh weather conditions in January and her belief that letter carriers were not given light-duty work and she acknowledged that might have misrepresented the availability of limited job duties to the physician. Appellant then submitted a report dated January 30, 2001 from Dr. Shinar, who addressed the period of disability. Dr. Shinar stated: “[appellant] raised some questions about the time she had off from December 27, 2000 until January 11, 2001 and explained that weather conditions would not have allowed her to perform light duty at that time and I am in agreement with this and she understands.” She further submitted a disability slip from Dr. Shinar dated January 30, 2001, in which he stated: “[appellant] required time off medically from December 27 until January 11, 2001.”

By decision dated July 26, 2001, the Office denied appellant’s claim for continuation of pay from December 27, 2000 through January 10, 2001, on the grounds that the medical evidence of record failed to establish that her absence from work was related to her December 15, 2000 employment injury.

The Board finds that the Office properly denied appellant’s claim for continuation of pay.

Section 8118 of the Federal Employees’ Compensation Act provides for continuation of pay, not to exceed 45 days and subject to specified conditions, to an employee who has filed a claim for a period of wage loss due to a traumatic injury.¹ Section 10.222(a)(3) of Title 20 of the Code of Federal Regulations provides that where pay is continued after an employee stops work due to a disabling traumatic injury, such pay shall be terminated only when medical evidence from the treating physician shows that the employee is not totally disabled and the employee refuses a written offer of a suitable alternative position which is approved by the attending physician.²

Disability generally means inability to earn the wages the employee was receiving when injured.³ Under the Act, the term “disability” means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of the injury.⁴ Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages.⁵ An employee, who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages he was receiving at the time of injury, has no disability as that term is used in the Act.⁶

The general test in determining loss of wage-earning capacity is whether the employment injury prevented the employee from engaging in the type of work he performed at the time he

¹ 5 U.S.C. § 8118.

² 20 C.F.R. § 10.222(a)(3) (1999).

³ *Gregory A. Compton*, 45 ECAB 154, 156 (1993).

⁴ *Maxine J. Sanders*, 46 ECAB 835, 839-40 (1995).

⁵ See *id* at 840.

⁶ *Id.*

was injured.⁷ If the employee is unable to perform the required duties of his position at the time he sustained the employment injury, he is disabled and had a loss of wage-earning capacity.⁸ Under the Office's regulations, a claimant is entitled to continuation of pay if he sustains a traumatic job-related injury, files a claim for a period of wage loss within 30 days of the injury, and the employee's disability begins within 45 days of the date of the injury.⁹

In this case, the Office accepted appellant's traumatic injury claim but found that the medical evidence was insufficient to establish that she was disabled from December 27, 2000 to January 10, 2001. The Office found that based on the medical evidence from Dr. Shinar and her factual statement, she was taken off work from December 27, 2000 through January 10, 2001 on the premise that no light duty was available, as opposed to the severity of her knee condition.

Dr. Shinar, in his December 27, 2000 report recommended two weeks of disability for appellant under the premise that light-duty work was unavailable to letter carriers. Appellant's misrepresentations to her physician regarding the availability of light-duty work clearly impacted his findings regarding disability, and thus, this report lacks probative value to support disability for the claimed time period.

Dr. Shinar, in his January 30, 2001 report stated that appellant should have been off during the claimed timeframe after appellant informed him that weather conditions would not have allowed her to perform light duty at that time. This report is also deficient in medical rationale pertaining to appellant's disability for work for the period claimed. The medical evidence from Dr. Shinar supporting disability from December 27, 2000 through January 10, 2001 lacks probative value.

The July 26, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
July 24, 2002

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁷ See *Marvin T. Schwartz*, 48 ECAB 521, 523 (1997).

⁸ See *id.*

⁹ See 20 C.F.R. § 10.205(a).