

On June 20, 2003 appellant filed a claim for wage loss beginning January 10, 2003. She stated that during this period she worked outside of her federal job as an independent displayer for Home Interiors & Gifts, Inc. one or two nights a week in the evening. On June 29, 2003 she explained what this entailed:

“I am an [i]ndependent [d]isplayer with Home Interiors and Gifts. I buy from them at wholesale and sell at retail. I carry a case of sample merchandise to [h]ostesses homes where their guests preview items and place orders for merchandise. I carry about five separate suitcases of supplies. ... However, these cases are carried into the shows by the hostess, her husband or her children who have come to my assistance. I conduct 1 to 2 shows per week which begin usually at 7:00 pm till 9:00 pm each show takes me about two hours and my gross profit is 30 percent of sales of the show.”

Appellant listed the homes shows she conducted during the period in question and her gross profit from each. She explained that she was claiming compensation for wage loss back to January 10, 2003 because that was the first sick day she took to go to the doctor to report the tingling and numbness in her left arm.

Appellant received medical restrictions on February 20, 2003. Her physician, Dr. R. Mitchell Rubinovich, an orthopedic surgeon, held her off work on February 26, 2003 pending receipt of diagnostic testing. The employing establishment advised that it could offer limited duty within appellant’s restrictions, duties that would involve no use of her left shoulder or arm, but Dr. Rubinovich reported that she was disabled for all work. On July 8, 2003 he returned her to full duty.

On July 9, 2003 the Office asked Dr. Rubinovich whether appellant was able to work her normal duties as a rural carrier associate during the period for which she claimed compensation. The Office provided Dr. Rubinovich with appellant’s description of her employment as an independent displayer and asked him to complete a work restriction evaluation form.

On February 26, 2004 the Office advised appellant that it had received no response from Dr. Rubinovich and that it was her responsibility to ensure that he sent in a report within 30 days. The Office also asked her to provide additional information about her job as an independent displayer.

Appellant advised that she began working for Home Interiors & Gifts, Inc. of Dallas, Texas, on March 29, 2001 and was still doing business as a representative. She submitted a Form 1040 Schedule C showing her profit or loss from that business in 2001 and 2002.

In a decision dated March 29, 2004, the Office denied appellant’s claim for compensation on or after January 10, 2003. The Office noted that it had received no medical opinion from Dr. Rubinovich to support her claim. The Office also noted that she had earnings from private employment that were greater than her claimed wage loss.

LEGAL PRECEDENT

A claimant seeking benefits under Federal Employees' Compensation Act¹ has the burden of proof to establish the essential elements of her claim by the weight of the evidence,² including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.³ As part of this burden, the claimant must submit rationalized medical opinion evidence based on a complete factual and medical background showing causal relationship.⁴

ANALYSIS

Appellant submitted no medical opinion to support that her accepted employment injury caused disability for work on or after January 10, 2003. The record shows that she received medical restrictions on February 20, 2003, and on February 26, 2003 her orthopedic surgeon, Dr. Rubinovich, held her off work pending diagnostic testing. But the medical record provides no discussion of the reason she could not perform regular or even limited duty on any particular date or during any particular period. The Office did its part in asking Dr. Rubinovich to address the issue, but he did not respond. The Office went one step further and advised appellant that it was her responsibility to secure such a report from Dr. Rubinovich within 30 days.

Appellant has the burden of proof in this case to submit the medical evidence necessary to support her claim for compensation. Without some explanation from Dr. Rubinovich of the reason appellant was totally disabled for all work during the period for which she seeks compensation, appellant has not met her burden of proof. The Board will affirm the Office's March 29, 2004 decision on this basis.

In denying appellant's claim for wage loss, the Office noted that she had no actual wage loss as a matter of fact due to her earnings as an independent displayer for Home Interiors & Gifts, Inc. But the record establishes that appellant began this work on March 29, 2001, a year and nine months before she first became aware of her left shoulder condition, and the Board has held that earnings from concurrent dissimilar employment cannot be considered evidence of a capacity to earn wages in the employment in which the claimant worked at the time of injury.⁵ As earnings from concurrent dissimilar employment cannot be considered when determining appellant's pay rate or, consequently, her wage-earning capacity,⁶ such wages are immaterial to her claim for injury-related wage loss on or after January 10, 2003.

¹ 5 U.S.C. §§ 8101-8193.

² *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

³ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁴ *Tracey Smith-Cashen*, 38 ECAB 568, 572-73 (1987).

⁵ *Irwin E. Goldman*, 23 ECAB 6, 10 (1971).

⁶ *Burnett Terry*, 46 ECAB 457, 471 (1995).

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish the critical element of causal relationship. She has submitted no medical opinion explaining her total disability for work on any particular date on or after January 10, 2003.

ORDER

IT IS HEREBY ORDERED THAT the March 29, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 26, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member