

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**MARVIS O. FETTERSON, Appellant**

**and**

**U.S. POSTAL SERVICE, NORTH LAKE PARK  
ANNEX, Charlotte, NC, Employer**

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**Docket No. 04-445  
Issued: December 29, 2005**

*Appearances:*

*Melvin L. Wall, Esq., for the appellant*

*Jim C. Gordon, Jr., Esq., for the Director*

Oral Argument November 29, 2005

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge

WILLIE T.C. THOMAS, Alternate Judge

MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 9, 2003 appellant filed a timely appeal from the September 3, 2003 merit decision of the Office of Workers' Compensation Programs, denying his claim for wage-loss compensation for total disability during the period March 7 through May 23, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether appellant has established that he is entitled to wage-loss compensation for total disability during the period March 7 through May 23, 2003 due to his accepted March 3, 2002 employment injuries and consequent surgery.

**FACTUAL HISTORY**

On March 18, 2002 appellant, then a 34-year-old mail handler, filed a traumatic injury claim alleging that on March 3, 2002 he strained his right forearm muscle while performing his

work duties.<sup>1</sup> By letter dated September 9, 2002, the Office accepted his claim for right shoulder strain and right lateral epicondylitis.

On February 19, 2003 the Office authorized a January 13, 2003 request from Dr. W. Alan Ward, appellant's attending Board-certified orthopedic surgeon, to perform arthroscopic synovectomy on his right elbow. He performed arthroscopic synovectomy and debridement of the right elbow on March 7, 2003. Dr. Ward found that appellant was totally disabled beginning March 7, 2003 until an undetermined time period.

On June 16, 2003 appellant filed a claim for compensation (Form CA-7) for the period of total disability from March 7 through May 23, 2003. He submitted Dr. Ward's undated attending physician's form report which found that appellant had right lateral epicondylitis and synovitis of the right elbow. Dr. Ward reiterated that appellant underwent right elbow surgery on March 7, 2003 and indicated with an affirmative mark that his conditions were caused by an employment activity. He further indicated that he first examined appellant on November 18, 2002. Dr. Ward found that appellant was totally disabled from March 7 through May 23, 2003.

In a June 18, 2003 letter, William J. Nowlin, appellant's supervisor, stated that it was impossible to complete the Form CA-7 as he had no knowledge of the injury appellant was reporting. Mr. Nowlin noted that appellant was terminated from his employment due to his attendance. He further noted that appellant alleged that the injury occurred on March 3, 2002 but only decided to file a claim after his termination sometime in June 2002. Mr. Nowlin indicated that, although appellant stated that the date of his first examination was on November 18, 2002, he did not seek any treatment until January 13 and March 7 and 17, 2003. He questioned appellant's delay in filing a claim.

By letter dated July 25, 2003, the Office advised appellant that additional factual information was needed before his claim could be processed. The Office requested that he submit documentation which proved that his termination for cause had been reversed. The Office referred to its February 6, 2003 decision which denied appellant's claim for compensation for total disability from August 9 through September 13, 2002 on the grounds that he failed to submit any medical evidence establishing that he was totally disabled during the claimed period and that, if he had not been terminated, his limited-duty job would still be available.<sup>2</sup>

Appellant submitted an unsigned report dated May 22, 2002 which contained Dr. Ward's typed name. The report indicated that he did not have any complaints of elbow pain and provided findings on physical examination of the right elbow. The report found that appellant had reached maximum medical improvement with regard to orthopedic services with a residual five percent permanent impairment of the right arm as a result of his condition. The report

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<sup>1</sup> The employing establishment removed appellant from its employment effective August 2, 2002 for cause as he failed to be in regular attendance, he demonstrated unacceptable conduct and he was absent without official leave. The employing establishment stated that his limited-duty job would still have been available if he had not been terminated.

<sup>2</sup> The Board notes that appellant has not appealed the Office's February 6, 2003 decision.

recommended that he get back to full activity without any specific restrictions. In a report of the same date, Dr. Ward found that appellant had a five percent impairment of the right arm.

On August 3, 2003 appellant completed a Form EN1032 which indicated, among other things, that, during the past 15 months, he worked for the employing establishment from March 2002 until June 2002 and that, during this same 15-month period, he was not self-employed.

By decision dated September 3, 2003, the Office denied appellant's claim for compensation. The Office found the evidence of record insufficient to establish that he was entitled to wage-loss compensation for total disability for the period March 7 through May 23, 2003 because he did not report any job earnings after he was removed from the employing establishment.

### **LEGAL PRECEDENT**

As used in the Federal Employees' Compensation Act,<sup>3</sup> the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>4</sup> Disability is, thus, not synonymous with physical impairment which may or may not result in an incapacity to earn wages.<sup>5</sup> An employee who has a physical impairment causally related to his federal employment, but who nonetheless has the capacity to earn the wages he 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.<sup>6</sup> 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 wages.<sup>7</sup>

To meet this burden appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor(s). The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty and must

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> *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(f).

<sup>5</sup> 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).

<sup>6</sup> 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).

<sup>7</sup> *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

Once the Office refers a claimant to a physician, it has the responsibility to obtain an evaluation which will resolve the issue involved in the case.<sup>9</sup>

The Office procedure manual provides, in pertinent part, that “The CE [claims examiner] should request medical evidence which is in possession of federal medical officers or hospitals, or which is maintained by a doctor who attended the claimant through authorization by the Office. The claimant is responsible for obtaining the medical reports in all other situations.”<sup>10</sup>

### ANALYSIS

The Office accepted appellant’s claim for right shoulder strain and right lateral epicondylitis. Appellant subsequently alleged that he was totally disabled from March 7 through May 23, 2003. The Board finds that the case is not in posture for decision.

In a March 19, 2003 form report and an undated form report, Dr. Ward found that appellant had synovitis of the right elbow and right lateral epicondylitis. On March 7, 2003 he performed arthroscopic synovectomy and debridement on the right elbow. On March 19, 2003 Dr. Ward found that appellant was totally disabled beginning March 7, 2003 for an undetermined time period. In the undated report, Dr. Ward found that appellant was totally disabled from March 7 through May 23, 2003. Dr. Ward did not provide any medical rationale explaining how or why appellant’s total disability was caused by the authorized March 7, 2003 surgery. However, as Dr. Ward was authorized by the Office to perform surgery on appellant’s right arm, it was required to obtain a medical report from the physician for the purpose of determining the period for which appellant was totally disabled due to the surgery.<sup>11</sup> The record does not establish that the Office requested such a report from Dr. Ward. The Board will remand the case to the Office for further development on this issue. The Office should request that Dr. Ward submit a report as to whether the March 7, 2003 right elbow surgery caused appellant to be totally disabled from March 7 through May 23, 2003. Following this and any other development deemed necessary, the Office shall issue an appropriate decision in the case.

### CONCLUSION

The Board finds that the case is not in posture for decision regarding the issue of whether appellant has established that he is entitled to wage-loss compensation for total disability for the period March 7 through May 23, 2003 due to his accepted March 3, 2002 employment injuries and consequent surgery.

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<sup>8</sup> *Judith A. Peot*, 46 ECAB 1036 (1995); *Ruby I. Fish*, 46 ECAB 276 (1994).

<sup>9</sup> *See Mae Z. Hackett*, 34 ECAB 1421 (1983).

<sup>10</sup> *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.6(d) (January 2004).

<sup>11</sup> *Id.*; *see also Mae Z. Hackett*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 3, 2003 decision of the Office of Workers' Compensation Programs is set aside and the case remanded for further consideration consistent with this decision of the Board.

Issued: December 29, 2005  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board