

Appellant was terminated from her federal employment on March 3, 2000. The employing establishment explained that, during the course of extended leave due to her knee injury, appellant requested and was granted leave without pay. On November 1, 1999 she requested leave without pay from August 25 through November 30, 1999; a duty status report stated that she was totally disabled but a physical therapist reported on September 9, 1999 that appellant was “working nights 3x/week 7 hours as nurse.” The Chief Medical Officer denied her request for leave without pay. She was placed in an absent without leave status on or about August 27, 1999 until her termination. Effective March 3, 2000 appellant was terminated for exhibiting unprofessional behavior that jeopardized the morale of the staff and impacted both staffing levels and the efficient delivery of patient care. The employing establishment determined that appellant requested leave without pay based on total disability while working as a nurse for another facility, demonstrated a lack of honesty, integrity and professionalism.

Appellant provided a history of wage loss. She indicated that she was earning \$20.07 an hour at the employing establishment as of March 14, 1999. Appellant itemized 648 hours of wage loss from April 29 to August 19, 1999. From August 20, 1999 to March 31, 2000 appellant indicated that she earned \$18.00 an hour in part-time employment at Olstein Health Services. She itemized 520.5 hours of wage loss during that period. Finally, she reported that she began full-time employment at the University of New Mexico Hospital on April 3, 2000, where she initially earned \$16.73 an hour. Beginning July 1, 2000 she earned \$17.82 an hour and beginning April 3, 2001 she earned \$19.12 an hour. Appellant associated these lower hourly earnings with a loss of wage-earning capacity when compared to her earnings at the employing establishment.

On October 10, 2001 Dr. George R. Swajian, appellant’s orthopedic surgeon, indicated in an attending physician’s form report that appellant was totally disabled for work from March 14 through August 19, 1999, was partially disabled from August 20, 1999 through March 31, 2000, and was able to resume regular work on April 2, 2000.

On July 8, 2003 appellant filed a claim for wage loss from April 2, 2000 to October 13, 2001.

In a decision dated November 13, 2003, the Office denied compensation for wage loss for the period claimed. The Office found no evidence in the record that appellant was disabled from April 2, 2000 to October 31, 2001. She was terminated for cause on March 3, 2000; she did not lose wages due to the March 14, 1999 work injury.

On October 19, 2004 appellant requested reconsideration. She argued that the issue was not whether her disability prevented her from working, but whether her disability rendered her unable to earn the wages that she was earning on the date of her disability. She argued that the Office had failed to take into account documentary evidence demonstrating that she was earning less at the University of New Mexico Hospital than she was at the time of her employment and disability with the employing establishment.

On April 22, 2005 appellant’s attorney stated that appellant did not recall that the employing establishment ever offered her light duty. He stated: “In order to stay in the VA system, which [she] wanted to do, she requested LWOP.”

On August 26, 2005 the employing establishment provided a leave usage summary and advised: "Light duty is always available for any OWCP claimants."

In a decision dated August 24, 2005, the Office reviewed the merits of appellant's claim and denied modification of its prior decision. The Office found that the evidence failed to demonstrate that appellant was incapable of earning wages at the same level as her date-of-injury job. The Office noted that the employing establishment would have accommodated appellant had she not been terminated for cause. The Office also noted no objective medical evidence impacting appellant's ability to earn, versus the submitted evidence of her lack of earnings.

LEGAL PRECEDENT

The United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.¹ "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.² When 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.³ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost.⁴

For each period of disability claimed, a claimant has the burden of proving that she was disabled for work as a result of her accepted employment injury.⁵ Whether a particular injury causes an employee to become disabled for work, and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.⁶ Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.⁷ The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.⁸

¹ 5 U.S.C. § 8102(a).

² 20 C.F.R. § 10.5(f) (1999).

³ *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

⁴ *George W. Coleman*, 38 ECAB 782 (1987).

⁵ *David H. Goss*, 32 ECAB 24 (1980).

⁶ *Edward H. Horton*, 41 ECAB 301 (1989).

⁷ *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

⁸ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS

The Board finds that the Office properly denied appellant's July 8, 2003 claim for wage loss from April 2, 2000 to October 13, 2001. Appellant was at this time separated from her federal employment for cause and working full time as a nurse at the University of New Mexico Hospital. Her orthopedic surgeon, Dr. Swajian, reported on October 10, 2001 that she was able to resume regular work on April 2, 2000. This undermines her claim that residuals of her March 14, 1999 employment injury were such that, from a medical standpoint, they prevented her from continuing in her employment.

Appellant bases her claim primarily on the fact that she earned a lower hourly wage when she went to work for the University of New Mexico Hospital. But as the Board noted earlier, compensation for loss of wage-earning capacity is based upon loss of the capacity to earn, not upon actual wages lost.

This case is similar to that of *John W. Normand*.⁹ The employee was terminated from his position by the employing establishment because of "menacing behavior toward a supervisor" and "unofficial use of government property." The question was whether he was entitled to compensation for wage loss for the relevant period after his termination. The employing establishment specifically stated that employment within the claimant's work restrictions would still have been available to him if his attitude toward his fellow employees had been acceptable. As there was no evidence the claimant was terminated due to his physical inability to perform his assigned duties, and as there was no evidence that he stopped work due to his physical condition, the Board found that he had no disability within the meaning of the Act.

In this case, there is no probative medical evidence that appellant was disabled for work from April 2, 2000 to October 31, 2001 as a result of her March 14, 1999 employment injury. She has submitted no physician's opinion, supported by clinical findings, directly addressing the specific dates of disability for which she seeks compensation and explaining how residuals of the March 14, 1999 employment injury prevented her from earning the wages she was earning at the time of injury. Appellant has not met her burden of proof.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish that she was disabled for work from April 2, 2000 to October 31, 2001 as a result of her March 14, 1999 employment injury.

⁹ 39 ECAB 1378 (1988).

ORDER

IT IS HEREBY ORDERED THAT the August 24, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 15, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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