U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOSEPH P. BISCEGLIA and U.S. POSTAL SERVICE,
POST OFFICE, Worcester, MA

Docket No. 00-1473; Submitted on the Record;
Issued March 8, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual wages as field representative fairly and reasonably represent his wage-earning capacity effective January 3, 1997; and (2) whether appellant met his burden of proof to establish that modification of the wage-earning capacity determination was warranted.

On January 24, 1981 appellant, then a 25-year-old letter sorting machine clerk, filed a traumatic injury claim alleging that, on that date, he sustained an injury to his lower back when he twisted around to throw letters into a mail sack in the performance of duty. Appellant stopped work on that date. The Office accepted appellant's claim for low back strain and a herniated disc at L5-S1. On December 12, 1988 appellant returned to a light-duty position with the employing establishment as a data entry clerk, four hours per day but stopped work on February 21, 1989. Appellant returned to work as a data entry clerk, four hours a day, on December 28, 1992 but on that same day, he was again injured when he fell through the seat of his chair. Appellant filed a separate claim for this injury, which the Office accepted for back spasms.[1] Appellant received appropriate compensation benefits for all periods of temporary total disability.

On December 12, 1996 appellant telephoned the Office and informed them that he had received an offer of employment from his neighbor, Congressman-elect Jim McGovern and was scheduled to start work January 7, 1997. By letter dated December 27, 1996, the Office asked appellant to submit additional information including the job's title, description, location, physical requirements and salary. The Office informed appellant that upon receipt of this information, his compensation would be adjusted to reflect his new earnings. Appellant submitted the requested information and began work on January 7, 1997.

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[1] In a decision dated July 24, 1995, the Office terminated appellant's compensation benefits for his December 28, 1992 back spasm claim, on the grounds that this condition had resolved. Appellant's compensation benefits for his 1981 back injury were restored on August 20, 1995. Appellant elected not to appeal the Office's 1995 decision terminating compensation for his accepted back spasms.

By decision dated March 26, 1997, the Office determined that appellant was reemployed as a field representative for Congressman Jim McGovern effective January 3, 1997 and that his actual wages in this position fairly and reasonably represented his wage-earning capacity. The Office terminated appellant's entitlement to compensation for wage loss, as his actual earnings exceeded the wages of the grade and step appellant held when injured. Appellant remained entitled to medical benefits for his accepted back conditions.

In a progress note dated June 13, 1997, Dr. Philip J. Lahey, Jr., a Board-certified orthopedic surgeon and treating physician, noted that appellant was having to take numerous days off work due to back pain and was now working part time. By letter dated October 23, 1997, Congressman McGovern forwarded to the Office appellant's claim for wage-loss compensation, Form CA-7, together with an October 17, 1997 attending physician's form report from Dr. Lahey, who indicated that appellant could only work four hours a day. The Congressman noted that despite his best efforts, appellant could only work part time and asked that his claim be considered by the Office. In a letter of response dated November 3, 1997, the Office informed appellant that if he disagreed with the wage-earning capacity decision of March 26, 1997, he could exercise his appeal rights as specified in the decision. The Office further explained that it would be necessary for appellant to show that either his work changed, or that his physical condition changed and he experienced a worsening of his original injury. The Office advised appellant that if he felt he had sustained a recurrence, he should file a claim Form CA-2a.

By letter dated March 24, 1998, appellant, through counsel, requested reconsideration of the Office's March 26, 1997 wage-earning capacity decision and submitted additional evidence in support of his request. Appellant asserted that he had sustained a recurrence of disability on November 1, 1997, such that he could only work four hours a day. Appellant also enclosed a completed recurrence of disability claim, Form CA-2a, also dated March 24, 1998 and asked that his claim be considered should his request for reconsideration be denied.

In a decision dated June 24, 1998, the Office found the newly submitted evidence insufficient to establish that appellant could only work four hours a day and, therefore, insufficient to warrant modification of the March 26, 1997 decision.

By letter dated June 21, 1999, appellant again requested reconsideration of the Office's June 24, 1998 decision and requested an additional 60 days to submit supporting evidence. In a decision dated September 21, 1999, the Office denied appellant's request for reconsideration on the grounds that appellant's letter raised no new arguments and the promised new evidence had not been received.

By letter dated October 4, 1999, appellant again requested reconsideration and submitted new medical evidence in support of his request.

In a decision dated November 18, 1999, the Office initially found that although technically, the timely filing requirements had not been met, the circumstances of this claim warranted granting appellant a merit review and consideration of the new evidence.[2] Upon review of the evidence, however, the Office denied modification on the grounds that the newly submitted medical evidence was insufficient to establish that he sustained a recurrence of disability.

The Board finds that the Office properly determined that appellant's actual wages as a field representative fairly and reasonably represent his wage-earning capacity.

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[4] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Albert C. Shadrick*[6] decision will result in the percentage of the employee's loss of wage-earning capacity.[7] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.[8]

[2] Under section 8128 of the Federal Employees' Compensation Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[3] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[4] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[5] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[6] 5 ECAB 376 (1953).

[7] *See Hattie Drummond*, 39 ECAB 904 (1988); *Shadrick, supra* note 6.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

In this case, appellant returned to work on January 7, 1997 as a field representative for Congressman McGovern. The field representative position was permanent and full time and did not constitute part-time, sporadic, seasonal or temporary work.[9] Moreover, appellant worked in the position for more than 60 days prior to the Office's wage-earning capacity determination and the record does not reveal that the position was a makeshift position designed for appellant's particular needs.[10] The Board, therefore, finds that the Office properly determined, that appellant's position as a field representative clerk fairly and reasonably represents his wage-earning capacity.

The formula for determining the loss of wage-earning capacity based on actual earnings, developed in the *Shadrick* decision, has been codified at 20 C.F.R. § 10.403. The Office first calculates the employee's wage-earning capacity in terms of a percentage by dividing his actual earnings by his current date-of-injury pay rate. In this case, the Office properly used appellant's actual earnings of $833.33 per week and a current pay rate for his date-of-injury job of $723.91 per week to determine that he had no loss of wage-earning capacity.[11] The Board finds that the Office properly determined that appellant's actual earnings fairly and reasonably represent his wage-earning capacity and the Office properly reduced appellant's wage-loss compensation to zero in accordance with the *Shadrick* formula.

The Board finds that appellant failed to meet his burden of proof to establish that modification of the wage-earning capacity determination was warranted.

Once loss of wage-earning capacity is determined, a modification of such determination is not warranted unless there is material change in the nature and extent of the injury-related condition, the employee has been retrained, or the original determination was in fact erroneous. The burden of proof is on the party seeking modification of the award.[12]

Appellant did not submit any evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In this case, the Office based appellant's loss of wage-earning capacity on a determination that his actual earnings as a field representative beginning on January 7, 1997 represented his wage-earning capacity.[13] As noted

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[9] *See William D. Emory*, 47 ECAB 365 (1996). The Board notes that in a treatment note dated June 13, 1997, Dr. Lahey stated that appellant had informed him that day that his employment contract ran "until November 1 and then it may change after that." However, this information only establishes that there may have been some contractual changes after November 1, but does not establish that the job was temporary. In addition, there is no other indication in the record that appellant's position was temporary.

[10] *Id.* Appellant was accommodated with nearby parking and by providing that he would not have to obtain medical clearance for every absence.

[11] In determining the current pay rate for appellant's date-of-injury job, the Office properly included premium pay consisting of any Sunday pay, holiday pay and night differential pay; *see* 5 U.S.C. § 8114(e); Federal (FECA) Procedure Manual, Chapter 2.900(5)(b)(1), (2) (September 1980).

[12] *Don J. Mazuek*, 46 ECAB 447 (1995); *see also Odessa C. Moore*, 46 ECAB 681 (1995).

[13] Disability is defined in the implementing federal regulations as "the incapacity, because of employment injury, to earn the wages the employee was receiving *at the time of injury*." (Emphasis added.) 20 C.F.R. § 10.5(f). The Office applied the principles enunciated in *Albert C. Shadrick*, *supra* note 6, in order to calculate the adjustment in appellant's compensation.

above, this determination was consistent with section 8115(a) of the Act, which provides that the "wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity."[14] Therefore, appellant has not shown that the Office's original determination with regard to his wage-earning capacity was erroneous.

Appellant alleged that there was a material change in the nature and extent of his employment-related condition. However, the record does not contain sufficient medical opinion explaining why an employment-related condition prevented appellant from performing the position of field representative or which otherwise establishes that the Office improperly determined appellant's wage-earning capacity.[15]

The record contains a treatment note dated January 3, 1997, immediately prior to the start of appellant's new position, in which Dr. Lahey appellant's treating physician and Board-certified orthopedic surgeon, noted that appellant had obtained a job which would not require any strenuous activities and advised appellant to return as needed. In a follow-up letter dated January 6, 1997, he stated: "[appellant] has recently been hired in a job working for the office of Congressman McGovern. I think he has permanent disability. I think he is disabled from any job that would require him to lift any weight, stand or sit for prolonged periods of time, squat, climb, kneel or twist at any time. I believe that this disability is permanent." In his next treatment note dated June 13, 1997, Dr. Lahey stated, in pertinent part, that appellant had been working in the Congressman's office since January and was having to take numerous days off because of his back pain. The physician noted that appellant reported that he was now working part time, 9 to 1 every day and missing about a day of work per week. Dr. Lahey further noted that appellant had recently been diagnosed with hepatitis C and needed treatment, possibly including a liver transplant. He concluded that appellant's examination and disability were unchanged. Appellant returned to Dr. Lahey on October 17, 1997 for a follow-up visit for his back pain. He again noted that appellant was working part time and had been for at least six months. Dr. Lahey concluded that appellant's examination was unchanged and advised appellant to return as needed. In an accompanying form report also dated October 17, 1997, he diagnosed chronic arachnoiditis, indicated by check mark that this condition was work related and noted that appellant had injured his back at work.[16] Dr. Lahey further indicated that beginning November 1, 1997, appellant was restricted to light-duty work, four hours a day.

Appellant next saw Dr. Lahey on February 19, 1999, at which time the physician noted that appellant was working part time and continued to complain of back pain and occasional sciatica. On physical examination, Dr. Lahey noted slight spasm to palpation, with 60 degrees of forward flexion, 10 degrees extension and 15 degrees right and left bends. Deep tendon reflexes were symmetrical and intact and straight leg raising was negative. He diagnosed chronic low back strain and chronic degenerative disc disease and concluded that he would not recommend

[14] 5 U.S.C. § 8115(a).

[15] *See Norman F. Bligh*, 41 ECAB 230, 237-38 (1989). Moreover, appellant has not been retrained or otherwise vocationally rehabilitated such that his work as a field representative would not be representative of his wage-earning capacity.

[16] However, Dr. Lahey also listed chronic arachnoiditis as a concurrent or preexisting condition.

any change in appellant's work status or disability. In his next medical report of record dated June 25, 1999, Dr. Lahey stated that he did not recollect the specific duties of appellant's field representative position, but emphasized that appellant was now unable to perform any job which required him to lift greater than 20 pounds, bend, stoop, squat, sit or stand for prolonged periods of time. Regarding his opinion that appellant could only perform these duties for four hours a day, Dr. Lahey stated: "I feel that given the nature of his condition that an eight hour workday with the attendant sitting and standing would be impossible for him to do." In his final medical report of record, Dr. Lahey stated:

> "In answer to your several questions, I would state that my knowledge of [appellant's] job responsibilities is based on an updated April 8, 1997 job description for the title 'District Representative.' The description is given in such a way that it is impossible for me to determine whether specific activities could or could not be performed. For example, 'be an ambassador for the Member and the Member's public policy views,' 'prepares monthly reports for the District Director and OS on pending cases….'
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> "Therefore, I would have to reiterate that any job that would require him to lift greater than 20 pounds, bend, stoop, squat, sit or stand for prolonged periods of time could not be performed. I have stated I did not feel that appellant could perform his job on a daily basis more than four hours per day. I base this on his history of pain that waxed and waned and that prolonged sitting or standing would cause his back to become more painful. To the best of my knowledge I did not have his job description when dictating the report on October 17, 1997."

The reports of Dr. Lahey do not contain a sufficiently rationalized medical opinion to establish that there was a material change in the nature and extent of appellant's injury-related condition, such that he was unable to perform the field representative position for eight hours a day.[17] He did not state that appellant's employment-related medical condition worsened but rather indicated that appellant's physical examination remained unchanged. His medical reports primarily reflected appellant's subjective complaints of pain.[18] Dr. Lahey did not specifically address how appellant's accepted back condition changed in a material fashion causing appellant to be unable to work four hours a day. Finally, the physical restrictions provided by Dr. Lahey in June 25 and September 24, 1999 reports, after appellant stopped working full time, were the same as those delineated in his January 6, 1997 report, completed just prior to appellant starting work as a field representative, a job which he successfully performed full time until approximately June 1997. For these reasons, appellant has not shown that the Office improperly refused to modify its determination of his wage-earning capacity.

To the extent that appellant alleged that he sustained an employment-related recurrence of disability, such that he could no longer perform his field representative position eight hours a day, the Board notes that when an employee, who is disabled from the job he held when injured

[17] *See Vicky L. Hannis*, 48 ECAB 538 (1997); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[18] *Carolyn Matthews*, 32 ECAB 748 (1981).

on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[19]

Appellant did not allege a change in the nature and extent of the light-duty job requirements. As noted, appellant has not submitted sufficient medical evidence to establish a change in the nature and extent of the injury-related condition as Dr. Lahey did not provide a fully rationalized medical opinion explaining the process through which appellant's employment-related medical condition worsened causing disability for four hours a day. The medical evidence is not sufficient to show that appellant was no longer able to perform the field representative position full time on or after June 1, 1997.

The November 18, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
March 8, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[19] *Cynthia M. Judd*, 42 ECAB 246, 250 (1990); *Terry R. Hedman*, 38 ECAB 222, 227 (1986).