U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TERRY J. HOLT and DEPARTMENT OF THE AIR FORCE, ALASKAN AIR COMMAND, ELMENDORF AIR FORCE BASE, Alas.

Docket No. 96-1689; Submitted on the Record;
Issued April 26, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to show that the Office of Workers' Compensation Programs improperly refused to modify its determination of his wage-earning capacity; (2) whether appellant met his burden of proof to establish that he sustained an employment-related recurrence of disability on or after May 1, 1995; and (3) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to show that the Office improperly refused to modify its determination of his wage-earning capacity.

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[1] The burden of proof is on the party attempting to show the award should be modified.[2]

In the present case, the Office accepted that appellant sustained an employment-related left shoulder strain with impingement syndrome on June 9, 1988. In March 1993 the Office accepted that appellant sustained an adjustment reaction and depression due to his June 9, 1988 employment injury.[3] After a period of receiving disability compensation, appellant returned to work for the employing establishment on June 28, 1993 in the light-duty position of mechanical engineering technician. The position required considerable walking and standing and occasional

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[1] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[2] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[3] Appellant underwent several left shoulder surgeries which were authorized by the Office.

climbing on structures and ladders. On February 28, 1995 the employing establishment advised appellant that he would be terminated from his mechanical engineering technician position due to a reduction-in-force associated with downsizing at his work site. In lieu of his termination by the reduction-in-force, the employing establishment offered appellant a position as a housing management assistant and on March 13, 1995 appellant was detailed to this position.[4]

By decision dated March 28, 1995, the Office determined that appellant's actual wages as a mechanical engineering technician since June 28, 1993 fairly and reasonably represented his wage-earning capacity. The Office also found that appellant was not entitled to continuing compensation for loss of wage-earning capacity because his salary as a mechanical engineering technician on February 16, 1994 exceeded the salary of his date-of-injury position on the same date. By decision dated July 19, 1995, the Office denied modification of its March 28, 1995 decision regarding appellant's wage-earning capacity; the Office also determined that appellant had not submitted sufficient medical evidence to establish that he sustained an employment-related recurrence of disability on or after May 1, 1995. By decision dated October 30, 1995, the Office denied appellant's request for merit review and, by decision dated April 4, 1996, the Office denied modification of its prior merit decisions.

Appellant did not submit any evidence to show that the Office's original determination with regard to his wage-earning capacity was erroneous. In the present case, the Office based appellant's loss of wage-earning capacity on a determination that his actual earnings as a mechanical engineering technician beginning on March 23, 1995 represented his wage-earning capacity.[5] This determination was consistent with section 8115(a) of the Federal Employees' Compensation 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."[6] The Board has stated, "[g]enerally, 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."[7]

The evidence does not establish that appellant's actual earnings as a mechanical engineering technician did not fairly and reasonably represent his wage-earning capacity and the

[4] Appellant stopped work on April 28, 1995 and used sick leave for intermittent periods; he later claimed that he had sustained an employment-related recurrence of disability beginning May 1, 1995. Effective May 7, 1995 the employing establishment formally reassigned appellant to the housing management assistant position. The position required standing for long periods, walking on uneven surfaces, bending, reaching and stretching. On June 28, 1995 the employing establishment advised appellant that it intended to terminate him due to his physical inability to perform his job.

[5] 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(a)(17). The Office applied the principles enunciated in *Albert C. Shadrick*, 5 ECAB 376 (1953), in order to calculate the adjustment in appellant's compensation.

[6] 5 U.S.C. § 8115(a).

[7] *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Clyde Price*, 32 ECAB 1932, 1934 (1981).

Office properly adjusted his compensation based on this wage-earning capacity determination.[8] The evidence does not establish that the position was an odd-lot or makeshift position designed for appellant's particular needs or that it was seasonal in nature.[9] For these reasons, 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 a rationalized medical opinion explaining why an employment-related condition prevented appellant from performing the position of mechanical engineering technician or otherwise establish that the Office improperly determined appellant's wage-earning capacity.[10]

The record contains form reports dated May 3, 1995 in which Dr. Morris R. Horning, an attending physician and Board-certified in physical medicine and rehabilitation, diagnosed an employment-related left shoulder acromion injury, left biceps tear and right meniscus tear and indicated that appellant could only perform "light[-]office work." He indicated that appellant could not climb, kneel, bend, stoop, twist, push or pull. In a report dated June 21, 1995, Dr. Horning stated, "[appellant] continues with his chronic medical/pain problems and his condition should be considered permanent at this level of function. His limitations prevent crawling, climbing, lifting, pushing and pulling activities." The reports of Dr. Horning do not contain a rationalized medical opinion indicating that appellant was unable to perform the mechanical engineering technician position.[11] Although Dr. Horning indicated that appellant could not engage in climbing, an activity required by the position, he did not provide a clear opinion that this activity was precluded by appellant's employment injuries, a left shoulder strain with impingement syndrome, adjustment reaction and depression. Appellant's claim has not been accepted for an employment-related lower extremity or low back condition and the medical evidence does not otherwise support such a finding. Dr. Horning did not explain the medical process through which appellant's employment-related medical condition worsened such that he would not be able to perform the mechanical engineering technician position.

In a report dated November 7, 1995, Dr. Larry A. Levine, an attending physician Board-certified in physical medicine and rehabilitation, noted that appellant suffered from shoulder and right knee problems, chronic low back pain, degenerative disc disease, obesity, tobacco abuse, asthma and seasonal allergies by history, hypertension, somatic overlay and depression/anxiety by history. He indicated that appellant exhibited increased clicking, popping and crepitation over the left shoulder and decreased range of motion of the left shoulder with

[8] *See Clarence D. Ross*, 42 ECAB 556, 561-62 (1991).

[9] *See James D. Champlain*, 44 ECAB 438, 440-41 (1993); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment and Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

[10] *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 mechanical engineering technician would not be representative of his wage-earning capacity.

[11] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

strength intact. Dr. Levine stated that appellant's restrictions were the same as those delineated in his September 20, 1995 report[12] and noted, "[b]ecause of his long-standing chronic back pain, he does need to change positions quite frequently and by his reports the job description of mechanic[al] engineering technician may not be possible."[13] Although he noted that appellant could only occasionally climb stairs, Dr. Levine did not attribute this restriction to an employment-related condition such as his left shoulder condition. He noted that appellant had some increased left shoulder symptoms, but he did not describe the medical process through which appellant's left shoulder would have worsened or clearly indicate that such an employment-related condition prevented appellant from performing the mechanical engineering technician position. Dr. Levine suggested that appellant's back condition might prevent him from performing the mechanical engineering technician position, but the Office has not accepted that appellant sustained an employment-related back condition. In a report dated December 4, 1995, Dr. Levine indicated that appellant was under his care for severe depression with suicidal ideation and noted that more aggressive treatment was necessary. He stated, "I believe that his current condition is directly correlated to his ongoing problems with chronic pain situation as well as multiple injuries and workers' compensation difficulties." However, Dr. Levine did not provide a clear opinion that appellant had an employment-related emotional condition which had worsened such that he was unable to perform the mechanical engineering technician position.[14] The record contains other reports of Dr. Levine but they do not contain an opinion that an employment-related condition prevented appellant from performing the mechanical engineering technician position.

For these reasons, appellant has not shown that the Office improperly refused to modify its determination of his wage-earning capacity.

The Board further finds that appellant did not meet his burden of proof to establish that he sustained an employment-related recurrence of disability on or after May 1, 1995.

When an employee, who is disabled from the job he held when injured 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

[12] In his September 20, 1995 report, Dr. Levine noted that appellant could not lift more than 25 pounds or lift above his shoulder on the left. He indicated that appellant could occasionally navigate stairs; that he had a decreased ability to frequently stoop, bend, push and pull; and that he could not engage in significant crawling or kneeling.

[13] Dr. Levine indicated that appellant's claustrophobia would preclude him from performing certain jobs.

[14] The Board further notes that Dr. Levine's opinion is of limited probative value regarding appellant's emotional condition in that he does not specialize in a field peculiar to that condition. The opinions of physicians whose training and knowledge in a specialized medical field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians. *Lee R. Newberry*, 34 ECAB 1294, 1299 (1983).

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.[15]

Appellant did not submit sufficient medical evidence to establish that he sustained an employment-related recurrence of disability on or after May 1, 1995. For the reasons described above, the medical evidence does not show that appellant was totally disabled from work on or after May 1, 1995 due to an employment-related condition. Neither Dr. Horning nor Dr. Levine provided a rationalized medical opinion explaining the medical process through which appellant's employment-related medical condition would have worsened such that he would have become totally disabled.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[16] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[17] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[18] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[19]

In connection with his October 2, 1995 reconsideration request, appellant submitted a September 20, 1995 report in which Dr. Levine noted that, due to his shoulder and right knee problems, chronic low back pain, degenerative disc disease and obesity, appellant's capacity to work as a housing management assistant might be decreased. He recommended various work restrictions, including no lifting more than 25 pounds or lifting above his shoulder on the left. Dr. Levine's opinion did not provide a clear opinion regarding the cause of appellant's work restrictions and therefore it does not relate to the main issue of the present case, *i.e.*, whether appellant submitted sufficient rationalized medical evidence to show that his wage-earning capacity should be modified or that he sustained an employment-related recurrence of disability on or after May 1, 1995. The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[20]

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

[16] Under section 8128 of the 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).

[17] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

[18] 20 C.F.R. § 10.138(b)(2).

[19] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[20] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

Appellant also resubmitted administrative documents and reports of Dr. Horning which had previously been considered. The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[21]

In the present case, appellant has not established that the Office abused its discretion in its October 30, 1995 decision by denying his request for a review on the merits of its July 19, 1995 decision under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated April 1, 1996, October 30 and July 19, 1995 are affirmed.

Dated, Washington, D.C.
April 26, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member

[21] *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).