

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JIMMIE L. YOUNG and DEPARTMENT OF VETERANS AFFAIRS,
SAN DIEGO VETERANS HOSPITAL, San Diego, Calif.

*Docket No. 97-2061; Submitted on the Record;
Issued April 22, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity based on his actual earnings; (2) whether appellant sustained a recurrence of disability on October 24, 1996 causally related to his accepted employment injury; and (3) whether appellant experienced periods of total disability from June 26 to July 8, 1996 causally related to his accepted employment injury.

The Board has duly reviewed the case on appeal and finds that the Office properly determined appellant's wage-earning capacity based on his actual earnings.

Appellant filed a claim on October 18, 1994 alleging that he injured his lower back lifting wet linen. Appellant returned to limited duty on November 2, 1994. The Office denied his claim on December 22, 1994 finding that appellant had not submitted sufficient factual evidence to meet his burden of proof. Appellant requested a review of the written record on January 25, 1995. By decision dated August 16, 1995, the hearing representative remanded the claim for further development as an occupational disease claim. The Office accepted appellant's claim for recurrent lumbosacral strain and aggravation of degenerative disc disease on December 21, 1995. The Office stated that appellant was entitled to continuation of pay.

Appellant accepted a limited-duty position on June 5, 1996 and returned to work on June 10, 1996. Appellant filed a notice of recurrence of disability on November 19, 1996 alleging on October 24, 1996 he sustained a recurrence of disability. By decision dated January 30, 1997, the Office found that appellant's actual earnings since June 10, 1996 represented his wage-earning capacity. In a March 5, 1997 decision, the Office found that appellant was entitled to continuation of pay from October 18 to November 2, 1994 and that the medical evidence of record was insufficient to establish that he was totally disabled from June 26 to July 8, 1995. By a separate decision dated March 5, 1997, the Office found that appellant had failed to establish that he sustained a recurrence of disability.

Section 8115 of the Federal Employees' Compensation Act,¹ titled "Determination of wage-earning capacity," states in pertinent part:

"In determining compensation for partial disability, ... the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity or if the employee has no actual earnings, his wage-earning capacity as appears reasonable under the circumstances is determined with due regard to --

- (1) the nature of his injury;
- (2) the degree of physical impairment;
- (3) his usual employment;
- (4) his age;
- (5) his qualifications for other employment;
- (6) the availability of suitable employment; and
- (7) other factors or circumstances which may affect his wage-earning capacity in his disabled condition."

Generally, wages actually earned are the best measure of a wage-earning capacity, and in the absence of evidence showing they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.²

In the present case, appellant worked as a modified housekeeping aid from June 10 through October 24, 1996. Appellant's performance of this position for 90 days is persuasive evidence that it represents his wage-earning capacity. There is no evidence that this position is seasonal, temporary, less than full time, or make-shift work designed for appellant's particular needs.³

The Board further finds that appellant did not meet his burden of proof in establishing a recurrence of disability on October 24, 1996 causally related to his accepted employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she 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 or she 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

¹ 5 U.S.C. § 8115.

² *Elbert Hicks*, 49 ECAB ____ (Docket No. 95-1448, issued January 20, 1998).

³ *Monique L. Love*, 48 ECAB ____ (Docket No. 95-188, issued February 28, 1997).

change in the nature and extent of the light-duty requirements.⁴ Furthermore, appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence, a causal relationship between his or her recurrence of disability commencing October 24, 1996 and his October 18, 1994 employment injury.⁵ This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁶

In support of his claim for a recurrence of total disability on October 24, 1996 appellant submitted a series of reports from Dr. Stacey J. Schulman, a Board-certified internist. On September 12, 1996 Dr. Schulman noted appellant's history of work injury and that appellant felt his symptoms were related to lifting heavy loads of laundry and folding sheets. She performed a physical examination and diagnosed low back pain, most likely musculoligamentous in nature. Dr. Schulman stated, "I feel that it is most likely the patient's symptoms are muscular and myofascial in nature and related to an overuse type phenomenon with the possibility of an underlying inflammatory process being much less likely."

On October 3, 1996 Dr. Schulman again noted that appellant related his symptoms to work. She did not address any change in appellant's condition and did not indicate that he was totally disabled. In a report dated January 7, 1997, Dr. Schulman stated that appellant had myofascial pain problems involving the lumbar spine, thoracic spine, shoulder girdle and posterior neck areas. She stated, "He currently is working as a housekeeping aid at the [employing establishment] and it is felt that his work-related duties which require him to lift and bend frequently are exacerbating his myofascial pain condition." Dr. Schulman recommended a change in position.

As Dr. Schulman did not provide an opinion that appellant's condition had changed nor that he was disabled, her reports are not sufficient to meet his burden of proof.

The Board further finds that appellant has not met his burden of proof in establishing that he was totally disabled from June 26 to July 8, 1995.

Appellant filed a claim for compensation requesting wage-loss compensation on March 1, 1996. By letter dated January 30, 1997, the Office stated it appeared that appellant was claiming leave buy back from October 18, 1994 through July 8, 1995. The Office stated that appellant used leave from October 18 through November 2, 1994 and returned to work on November 3, 1994. The Office stated, "You were eligible for continuation of pay (COP) during that period. Your employer should convert your leave records to reflect COP charges and reinstated the leave used during that period." The Office also denied appellant's claim for total disability from June 26 to July 8, 1995. In its March 5, 1997 decision, the Office finalized these findings.

⁴ *Terry R. Hedman*, 38 ECAB 222 (1986).

⁵ *Dominic M. DeScala*, 37 ECAB 369, 372 (1986); *Bobby Melton*, 33 ECAB 1305, 1308-09 (1982).

⁶ *See Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

The medical evidence addressing appellant's disability from June 26 to July 8, 1995 consists of reports, from Dr. William C. Carley, a Board-certified family practitioner. On June 30, 1995 Dr. Carley completed a form report and indicated that appellant was totally disabled from June 26 to July 3, 1995. This report did not include any opinion explaining how and why appellant was totally disabled for this period and is insufficient to meet appellant's burden of proof.

In a report dated July 3, 1995, Dr. Carley stated that appellant wished to remain on sick leave for a week pending the Office's decision. This report does not support that appellant was totally disabled for work and indicates that Dr. Carley was merely accommodating appellant's wishes rather than independently finding appellant totally disabled.

The Board finds that the Office improperly informed appellant that he was entitled to continuation of pay for the period from October 18 to November 2, 1994. Appellant's claim was accepted as an occupational disease. An employee is not entitled to continuation of pay unless the employee has sustained a traumatic injury.⁷ As appellant did not sustain a traumatic injury, the Office should consider the medical evidence and determine whether appellant is entitled to compensation benefits for any period from October 18 to November 2, 1994.

The decisions of the Office of Workers' Compensation Programs dated January 30 and March 5, 1997, are hereby affirmed. The March 5, 1997 decision is affirmed in regard to the period of compensation from June 26 to July 8, 1995 and remanded for further consideration of appellant's right to compensation benefits from October 18 to November 2, 1994.

Dated, Washington, D.C.
April 22, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁷ *Richard D. Wray*, 45 ECAB 758, 762 (1994).