U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. VARGA and DEPARTMENT OF THE NAVY, LONG BEACH NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 96-2235; Submitted on the Record;
Issued January 20, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined appellant's wage-earning capacity.

On September 30, 1992 appellant, a ship surveyor (pipefitter), sustained an injury in the performance of duty when he slipped and fell. The Office accepted his claim for cervical strain and herniated nucleus pulposus at C4-5 and C5-6, and authorized surgery on April 20, 1993 for disc excision and fusion at C4-6. Dr. R. Victor Gallardo, an orthopedic surgeon and appellant's attending physician, released appellant to return to work on July 20, 1993 with no heavy lifting.[1]

The job description submitted by the employing establishment indicates that the typical work performed by a ship surveyor (pipefitter) included investigating, work planning, work estimating, technical support and technical writing. The physical effort of the position was described as follows:

> "On various occasions, the incumbent will be required to travel to other activities and aboard all types of [n]aval [s]hips for inspection of work, conferences actions or to provide technical support. This may required [sic] physical demands incidental to climbing masts, superstructures, bending for access to tanks, voids and various compartments aboard ship in addition to inspection work accomplished in drydocks and marine railways."

Appellant returned to full duty on July 20, 1993. The employing establishment indicated that his work assignment was not changed because of disability resulting from the accepted employment injury. On May 2, 1996 the employing establishment advised the Office that appellant was doing his date-of-injury job with no loss of wages.

[1] The physician specified a lifting limitation of 50 pounds on August 24, 1995.

On April 9, 1996 Dr. Andrew M. Cooperman, a Board-certified orthopedic surgeon and Office referral physician, reported that appellant could return to his usual work duties and that, fortunately, appellant's job duties were essentially within his functional capacity. Dr. Cooperman stated that appellant should avoid repetitive neck twisting and turning and was not to perform such activities for more than two hours at a time. He also restricted appellant from lifting or carrying more than 50 pounds at a time.

In a decision dated May 30, 1996, the Office advised appellant that it was terminating his compensation. The Office determined that appellant's position as a ship surveyor (pipefitter) fairly and reasonably represented his wage-earning capacity, and found that because his actual wages met or exceeded the wages of the job held when injured, no loss of wages had occurred.

The Board finds that the Office properly determined appellant's wage-earning capacity.

The Federal Employees' Compensation Act ("Act") provides that the United States shall pay compensation as specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.[2] Regulations define "disability" as "the incapacity, because of employment injury, to earn the wages the employee was receiving at the time of injury."[3]

On July 20, 1993 appellant returned to the position of ship surveyor (pipefitter), the position he held at the time of injury. Moreover, he returned to full duty with no wage loss. For this reason, he is not entitled to monetary compensation. His attending physician, Dr. Gallardo, imposed a restriction against heavy lifting, later specified at 50 pounds, but nothing in the record suggests that appellant's date-of-injury position required such strenuous lifting. The Office referral physician, Dr. Cooperman, imposed the same restriction against both lifting and carrying, and added that appellant should avoid repetitive neck twisting and turning for more than two hours at a time. He reported, however, that appellant's duties were essentially within his functional capacity, and nothing in the record supports that appellant's duties required him to engage in repetitive neck twisting and turning for more than two hours at a time. It cannot be said, therefore, that the medical restrictions imposed in this case in any way disabled appellant from fully performing the physical demands of his date-of-injury position. Indeed, the employing establishment indicated that appellant had returned to full duty on July 20, 1993 and that his work assignment was not changed because of disability resulting from the accepted employment injury. Further, there is no evidence in the record that the employing establishment changed appellant's work assignment to accommodate his injury-related condition.

The Office's procedure manual provides: "If the claimant returns to work at a retained pay rate, and therefore incurs no wage loss, the CE [claims examiner] should still issue a formal LWEC [loss of wage-earning capacity] decision."[4] The Office properly followed its procedures and determined that appellant had no loss of wage-earning capacity.

[2] 5 U.S.C. § 8102(a).

[3] 20 C.F.R. § 10.5(a)(17).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*,

The Board notes that a determination of wage-earning capacity bears on an injured employee's entitlement to monetary compensation for wage loss, not the employee's entitlement to ongoing or future medical benefits, including surgery. In addition, the Office's decision does not preclude appellant from filing any future claim of a recurrence of disability causally related to the accepted employment injury.

The May 30, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 20, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Chapter 2.814.7(4) (December 1993).