U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL ANN BISCOE and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Cleveland, Ohio

Docket No. 97-684; Submitted on the Record;
Issued January 26, 1999

DECISION and ORDER

Before MICHAEL E. GROOM, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits effective February 4, 1996 based on its determination that the selected position of clerk-typist fairly and reasonably represented her wage-earning capacity.

On May 3, 1988 appellant, then a 30-year-old mail/distribution clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she sustained an injury to her right lower back on April 29, 1988 while pushing over 100 pounds of mail, cases and boxes. The Office accepted the claim for lumbosacral strain.[1]

On March 27, 1989 appellant filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that her chronic dorsal lumbar and back strain was due to her employment and stated that she filed an incorrect form on May 3, 1988.[2] On October 20, 1989 the Office denied the claim on the basis that the evidence of record was insufficient to establish that her disability was causally related to factors of her employment.

Appellant filed a claim for recurrence of disability commencing November 1, 1988. The Office accepted the claim for chronic lumbar strain and placed appellant on the periodic rolls for temporary total disability effective July 31, 1989.

By letter dated October 29, 1991, the Office referred appellant, along with a statement of accepted facts and medical records, to Dr. Gary I. Katz, a Board-certified orthopedic surgeon, for an evaluation.

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[1] This was assigned claim number A9-322371.

[2] This was assigned claim number A9-333111.

In a report dated November 12, 1991, Dr. Katz opined that appellant was capable of performing her usual position with no restrictions. Dr. Katz based this opinion upon a physical examination, which found no sensory or motor loss in the legs, no muscle atrophy, good range of motion in her lumbar spine and no signs of nerve root compression.

On June 11, 1991 appellant was referred for vocational rehabilitation services.

By letter dated February 3, 1992, the Office requested that Dr. James E. Fleming, appellant's treating physician, review Dr. Katz's report and indicate any physical restrictions on an enclosed form.

In a work restriction form, OWCP-5, dated February 13, 1992, Dr. Fleming opined that appellant had not reached maximum medical improvement and checked that appellant required counseling services. Dr. Fleming noted a lifting restriction of up to 20 pounds and hand restrictions.

In a final report dated May 11, 1992, the rehabilitation counselor noted that appellant had been terminated from her work evaluation program due to poor attendance.

In a letter dated May 18, 1992, the Office found a conflict in the medical opinion evidence regarding appellant's physical restrictions between Dr. Fleming, her treating physician and Dr. Katz, the second opinion physician and referred appellant to Dr. William Junglas, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a report dated May 29, 1992, Dr. Junglas, based upon a review of the medical evidence, a statement of accepted facts and physical examination, opined that there was no objective evidence to support that appellant remained totally disabled for all work. Dr. Junglas opined that appellant would benefit from counseling efforts to help ease her back into work. In an attached work restriction form dated June 15, 1992, Dr. Junglas advised a gradual return to work for appellant and that appellant should reach maximum medical improvement in six to nine months. No further action was taken.

By letter dated January 10, 1995, the Office requested that appellant submit an updated medical report from her primary care physician.

By letter dated February 14, 1995, the Office referred appellant to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, along with a statement of accepted facts, the medical record and questions to be answered, for an evaluation of whether appellant was capable of her former employment.

In a report dated March 8, 1995, Dr. Kaffen opined that appellant still had physical residuals from her employment injury with limitation of motion and muscle spasm. As to physical restrictions, Dr. Kaffen indicated that appellant was "capable of performing her job as a mail distribution clerk with the exception of frequent bending and lifting over 20 pounds."

By memorandum dated August 3, 1995, the rehabilitation specialist identified the positions of clerk-typist and data entry clerk as being within the restrictions specified by

Dr. Kaffen and "include full-time-light duty capacities with a prohibition against lifting and carrying." The physical demands were noted as sedentary, no climbing, no stooping, kneeling or crouching, yes for talking and hearing in the clerk-typist position and no for the data entry clerk. He noted that positions were reasonably available in appellant's commuting area.

By notice of proposed reduction dated August 18, 1995, the Office advised appellant of its proposal to reduce her compensation on the basis that she was no longer totally disabled and that she was able to earn the wages of a clerk/typist. The Office allotted appellant 30 days, in which to submit additional information.[3]

By decision dated January 26, 1996, the Office finalized the loss of wage-earning capacity determination and adjusted appellant's compensation effective February 4, 1996. In an attached memorandum, the Office noted that the weight of the medical evidence, as represented by Dr. Kaffen's report, established that appellant was no longer totally disabled due to her accepted employment injury.

In a letter dated August 9, 1996, appellant disagreed with the reduction of her compensation and submitted a March 18, 1996 report from Dr. Fleming, her treating physician, a copy of her hospitalization dated October 9, 1995, a February 13, 1992 work restriction form completed by Dr. Fleming, a November 1988 report by Dr. Lawrence K. Lief and physical therapy notes dated February 20, 1989 from James Keske.

In a report dated March 18, 1996, Dr. Fleming noted the history of appellant's employment injury, her August 14, 1995 automobile accident, which resulted in an amputation. Dr. Fleming stated that appellant's "limitations with respect to work activity remains essentially unchanged. She is limited to sedentary activity. No lifting over 5 to 10 pounds, minimal stooping, bending and twisting of the lumbar spine." Dr. Fleming then indicated that "since the motor vehicular accident of August 1995 she has been permanently and totally disabled."

By decision dated August 15, 1996, the Office denied appellant's request for modification of its prior decision on the basis that evidence submitted was irrelevant and insufficient to warrant review of the prior decision.

The Board finds that the Office properly reduced appellant's compensation benefits effective February 4, 1996, based on its determination that the selected position of clerk-typist fairly and reasonably represented her wage-earning capacity.

Under the Federal Employees' Compensation Act,[4] once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.[5]

[3] In a report of telephone or office call dated September 6, 1995, the Office noted that appellant called to inform the Office that she was involved in a car accident on August 14, 1995, which caused her to lose her leg.

[4] 5 U.S.C. §§ 8101-8193.

[5] *James B. Christenson*, 47 ECAB 775 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.[6]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[7] Section 8106(a)[8] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between her monthly pay and her monthly wage-earning capacity after the beginning of the partial disability.[9]

Section 8115 provides that the wage-earning capacity of an employee is determined by his or her actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[10] If the actual earnings do not fairly and reasonably represent the employee's wage-earning capacity, or if the employee has no actual wages, wage-earning capacity is determined by considering the nature of the injury, the degree of physical impairment, the employee's usual employment, age and qualifications for other employment, the availability of suitable employment and other factors and circumstances, which may affect his wage-earning capacity in his disabled condition.[11] A job in the position selected for determining wage-earning capacity must be reasonably available in the general labor market in the commuting area in which the employee lives.[12]

In this case, the Board finds that the medical evidence establishes that appellant is no longer totally disabled for work because of the effects of the May 3, 1988 lumbosacral strain. Dr. Katz, a second opinion physician, opined that appellant was capable of performing her usual position with no restrictions in a report dated November 12, 1991. Dr. Fleming, appellant's treating physician, reviewed Dr. Katz's report and disagreed. Dr. Fleming opined that appellant was still disabled in a report dated February 13, 1992. The Office found a conflict and referred appellant to Dr. Junglas for resolution. Dr. Junglas, in his May 29, 1992 report, opined that there was no objective evidence that appellant was totally disabled for all work. Dr. Junglas recommended a gradual return to work and that appellant should reach maximum medical improvement in six to nine months. On February 14, 1995 the Office referred appellant to

[6] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553 (1995).

[7] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[8] 5 U.S.C. § 8106(a).

[9] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[10] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB 120 (1995).

[11] *Mary Jo Colvert*, 45 ECAB 575, 579 (1994); *Samuel J. Chavez*, 44 ECAB 431, 436 (1993).

[12] *Barbara J. Hines*, 37 ECAB 445, 450 (1986).

Dr. Kaffen for an evaluation of appellant's employment capabilities. In his March 8, 1995 report, Dr. Kaffen indicated that appellant had some restrictions, but that she was capable of performing her job as a mail distribution clerk. By letter dated August 9, 1996, Dr. Fleming opined that appellant has been permanently disabled since her August 1995 motor vehicle accident. Drs. Kaffen and Junglas both opined that appellant is not totally disabled due to her accepted employment injury. Dr. Fleming opines that appellant is totally disabled, but attributes her disability to a motor vehicle accident in August 1995.[13]

The Office properly found in its proposed reduction of compensation, which was finalized on January 26, 1996 that appellant was no longer totally disabled for work due to the effects of her May 3, 1988 back injury. In a report dated March 8, 1995, Dr. Kaffen indicated work restrictions of no frequent bending and no lifting over 20 pounds. Dr. Fleming indicated that appellant is limited to sedentary activity, no lifting over 5 to 10 pounds, minimal stooping, bending and twisting of the lumbar spine. Dr. Fleming further stated that appellant is totally disabled due to a nonwork incident.

When rehabilitation efforts proved unsuccessful, the Office's procedures instruct the rehabilitation counselor to submit a closure report to the Office, with relevant information regarding the suitability and availability of the selected positions. The record indicates, therefore, that due regard was given to the factors enumerated in 5 U.S.C. § 8115(a) in selecting the position of clerk-typist as representative of appellant's wage-earning capacity. Appellant's compensation was properly reduced to reflect her wage-earning capacity in accordance with the principles set forth in *Shadrick*.[14]

[13] Regarding appellant's physical ability to perform the selected position, the Board notes that appellant submitted evidence of a leg amputation related to an automobile accident subsequent to the employment injury. A condition which develops following an employment injury and which is not a consequence of the employment injury is not considered in determining wage-earning capacity. *Alfred R. Hafer, supra* note 6.

[14] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

The decisions of the Office of Workers' Compensation Programs dated August 15 and January 26, 1996 are hereby affirmed.

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

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member