U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRANCISCO B. CHAVIRA and DEPARTMENT OF THE ARMY, WHITE SANDS MISSLE RANGE, White Sands, NM

Docket No. 98-993; Submitted on the Record;
Issued April 5, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of "order clerk" fairly and reasonably represented appellant's wage-earning capacity effective April 27, 1997.

The Office accepted that on March 10, 1987 appellant, then a 54-year-old engineering technician, sustained low back strain, left knee sprain, left ankle sprain and aggravation of preexisting disc disease when he slipped on wet concrete and fell backwards.[1] He stopped work and was placed on the periodic rolls for receipt of compensation.

By report dated May 19, 1993, Dr. Raul Rivera, a Board-certified family practitioner, noted that appellant had reached maximum medical improvement and was totally disabled for gainful employment; he noted appellant's conditions as osteoarthritis, chronic discogenic pain syndrome, and parkinsonism.[2] Dr. Rivera reiterated this opinion on October 30, 1993. In an OWCP-5c dated August 30, 1995, he noted that the work activities of kneeling, standing, bending, twisting, reaching and lifting should be limited to that which was necessary for self-care, that appellant was totally and permanently disabled and that he could work zero hours per day. He noted that there were limitations in appellant's fine motor movements of the upper extremities in that he had severe Parkinson's disease (Paralysis agitans) which was recalcitrant to intense therapy even with a combination of several anti-parkinsonism agents. Dr. Rivera also noted that appellant was afflicted with severe osteoarthritis involving his hands and wrists and he noted that "all limitations due to traumatic-induced accelerated osteoarthritic disease." He noted

[1] Appellant's left knee had previously been reconstructed by surgery in 1974; he received a schedule award for a 15 percent impairment of the left lower extremity for the period July 3, 1978 through May 1, 1979. He had also sustained similar injuries in accidents occurring on August 24, 1970 and October 18, 1977.

[2] Appellant's Parkinson's disease was not diagnosed until 1989, 1991, subsequent to his 1987 accepted employment injuries.

that appellant's restrictions were permanent, that no improvement was forseen and that appellant was afflicted with sequelae of severe work-related injuries, specifically an old fracture at L3-4 with subsequent degenerative disc disease and bulging annuli and marked degenerative changes of the left knee after meniscectomy.

On April 4, 1996 the Office referred appellant for a second opinion examination to determine whether he was totally disabled for all employment and if not, to enumerate his physical work restrictions.[3]

By report dated May 23, 1996, Dr. Brandon noted that he was assessing appellant's physical limitations "as per the guidelines set forth in the 1989 American Medical Association, 3rd Edition, Second printing, *Guides to the Evaluation of Permanent Impairment"* and a subsequent functional capacity test.[4] He reviewed appellant's history of injury and noted that appellant had, in decreasing order of frequency and severity, left lumbosacral pain, right lumbosacral pain, anterior left knee pain and lateral left ankle pain. Dr. Brandon provided only a narrative summary of his physical examination results[5] and of what x-rays demonstrated[6] and he diagnosed "symptomatic lumbar L3-4, L4-5 bulging disc and degenerative arthritis without nerve root compression, status post medial meniscectomy, left knee, with secondary anterior medial degenerative arthritis, chronic strain, left ankle without degenerative arthritis [and] Parkinson's disease with primary affect in the left arm and leg." He noted that a functional capacity test had been performed,[7] which supposedly indicated that appellant was capable of performing sedentary activities eight hours per day, but was incapable of performing activities beyond that level. Dr. Brandon noted that, due to appellant's tremor in the left hand, rapid or repetitive use of the left hand would be significantly impaired during activity.

In answer to the Office's questions, Dr. Brandon replied that appellant had reached maximum medical improvement and that he did not anticipate that continued physical therapy would achieve any further improvement. He opined that appellant could perform sedentary duty

[3] No copies of the statement of accepted facts or the questions to be answered, which were supposedly provided to Dr. Jeffrey L. Brandon, a Board-certified orthopedist and the Office's second opinion specialist, for his second opinion, were included in the case record.

[4] The Board notes that this edition of the A.M.A., *Guides* has been superceded by the fourth edition which would have been applicable in this case.

[5] Noting, confusingly, both that "[s]traight leg raising to 70 degrees is possible in either leg" and that "[s]traight leg raising in the supine position can achieve 60 degrees in either leg." The Board notes that straight leg raising in the seated position was not reported.

[6] No radiologists' reports were submitted to the record.

[7] This report was not included in the case record. The record, however, does contain a January 8, 1988 functional capacity evaluation performed for Dr. Oren H. Ellis, a Board-certified orthopedic surgeon, some eight years earlier, which is not sufficiently contemporaneous to form a valid basis for work capacity determination in 1996.

eight hours per day,[8] that the degenerative disc disease and degenerative arthritis in appellant's lumbar spine and left knee were chronic and permanent and were not expected to resolve and that he would continue then and in the future to have partial remissions and exacerbations of symptoms in both areas.[9] Dr. Brandon also completed an OWCP-5c work capacity evaluation form noting "see functional capacity report." He opined that appellant could lift 10 pounds with the right hand, 1 pound with the left hand and perform fine movements and repetitive motions with the right hand only. Dr. Brandon opined that appellant could perform occasional standing and could work eight hours sedentary duty with breaks every 30 to 45 minutes. He noted that appellant was unable to perform all other activities.

On October 22, 1996 the employing establishment offered appellant the job of "clerk" which required receiving visitors and telephone calls, making referrals and furnishing information. The job also required that appellant route, control and distribute mail to several units and individuals, maintain and classify a variety of files, obtain, compile and summarize statistical data, compose routine correspondence and prepare simple graphs, charts and tables or other material.

By letter dated October 25, 1996, the Office advised appellant that the offered position was suitable to his partially disabled condition and it advised that he had 30 days within which to accept the position or to provide reasons for his refusal. It also advised him of the provisions of 5 U.S.C. § 8106(c)(2).

By response to the employing establishment dated October 31, 1996, appellant declined the position stating that his physician, Dr. Rivera, had never advised him that he could return to gainful employment and that his employment injuries were compounded by his Parkinson's disease which was chronic and progressive and was characterized by tremors, slow movement, dementia and generalized body rigidity, for which he was being treated by neurologist Dr. Steven Crouse.

By letter to the employing establishment dated November 18, 1996, appellant restated his contentions and enclosed a May 10, 1996 statement from Dr. Rivera.

By letter dated May 10, 1996, Dr. Rivera referred to his earlier medical reports which supported his contentions that appellant was totally and permanently disabled due to his medical problems and work-related musculoskeletal injuries and sequelae. He noted that on May 9, 1996

[8] However, no medical rationale for this conclusion was provided, except for reference to a functional capacity evaluation that was not made part of the record.

[9] Dr. Brandon did not address whether appellant's accepted condition of "aggravation of preexisting disc disease," had remained the same, had worsened or had resolved, or whether it factored into appellant's endurance or his ability to sit for extended periods.

appellant's osteoarthritis had "advanced relentlessly and his musculoskeletal impairment is intensified." He further advised:

> "Special importance is now related to the marked impairment caused by the severe and rapid progression of parkinsonism. [Appellant] presents with severe tremor and intense deterioration of the neurological system with total impairment of his motor skills. He is now suffering from memory loss, disorganized mentation and severe episodes of depression. [Appellant] is unable to stand, walk, sit or drive a motor vehicle for extended periods of time which may exceed 15 minutes."

On December 20, 1996 an Office claims examiner opined that Dr. Brandon's report constituted the weight of the medical evidence and he requested that a rating be done by the Office rehabilitation specialist based on the use of the right hand only.

By letter dated December 26, 1996, the Office advised appellant that his reasons for not accepting the job offer of October 22, 1996 were valid. The Office then withdrew its request that appellant accept the job offer and noted that no further action was needed regarding that subject.

The Office rehabilitation specialist proceeded with the rating and noted by memorandum dated January 27, 1997 that, based upon appellant's "ability" to work eight hours a day in a sedentary position with a maximum lifting of 10 pounds with the right hand only, two positions had been identified which appellant could perform. These positions were identified as telephone solicitor and order clerk, which required occasional to frequent reaching, handling and fingering activities which was limited to paperwork and computer input. These jobs required working with standard forms and/or dedicated computer programs to confirm accuracy of data, update old data and verify current customer orders.[10]

The Office then calculated appellant's loss of wage-earning capacity based upon his ability to perform the position of order clerk and on March 11, 1997 it provided him with a notice of proposed reduction of compensation. The Office found that the medical evidence of record established that he was no longer totally disabled and had the capacity to earn wages as an order clerk at the rate of $316.00 per week. The Office noted that since it did not accept Parkinson's disease as being work related, it was not, therefore, considered as a factor in determining appellant's ability to work.

By letter dated April 4, 1997, appellant, through his representative, resubmitted several medical reports previously of record and an April 7, 1997 report from Dr. Rivera which referenced the other previously submitted medical reports and asserted that they highlighted "the pathological processes rendering [appellant] totally and permanently disabled for any gainful employment." He opined that appellant had "advancing degenerative, generalized osteoarthritis

[10] The telephone solicitor position required soliciting orders over the telephone, calling prospective customers, quoting prices and persuading customers to but using prepared sales talk, recording names and information and inputting data using a keyboard. The order clerk position required processing orders using computers or calculators, data entry, performing credit checks, checking inventory control, preparing invoices, shipping documents and labeling, and customer interaction.

[which] has evolved into a chronic pain syndrome which renders him totally disabled."[11] Dr. Rivera "vehemently reiterate[d] that in [his] professional opinion, [appellant] is totally and permanently disabled for any gainful employment."

By decision dated April 21, 1997, the Office finalized its proposed reduction of compensation and computed appellant's wage-earning capacity based on his ability to earn the wages of an order clerk effective April 27, 1997.

By second decision dated April 26, 1997, the Office again finalized its proposed reduction of compensation finding that the evidence of record established that appellant was no longer totally disabled, but was partially disabled and had the capacity to earn wages as an order clerk.

By letter dated April 25, 1997, appellant, through his representative, disagreed with the reduction of compensation and requested an oral hearing. In support, appellant submitted a September 23, 1997 report from Dr. Rivera which noted that, when examined on September 15, 1997, appellant "present[ed] with further deterioration of his condition and acceleration of the osteoarthritic process, *i.e.,* bouts of severe pain and swelling of the left knee and severe low back pain." He opined that appellant's "work-related injuries and their sequelae … rendered him totally and permanently disabled."

The hearing was held on September 23, 1997 at which appellant and Dr. Rivera testified. Dr. Rivera testified that appellant's condition after 1987 had not remained the same but had deteriorated markedly, with his osteoarthritis being accelerated and becoming more painful more frequently and he opined that appellant could not "hold a job for four hours, much less than eight." He opined that appellant would be incapable of performing any of the tasks of an order clerk.

By decision dated December 5, 1997, the hearing representative affirmed the decisions of the Office finding that the report of Dr. Brandon was well rationalized and that it was based upon the functional capacity examination, even though the report of this evaluation was not part of the case record,[12] Dr. Brandon concluded that appellant could perform sedentary duty eight hours per day.

The Board finds that this case is not in posture for a wage-earning capacity determination due to an unresolved conflict in medical opinion evidence on the issue of whether appellant is totally or partially disabled.

[11] Dr. Rivera also attributed appellant's disability to the nonaccepted conditions of fracture of the body of L3 and L4 vertebrae (a 1970 injury), right shoulder, periscapular and trapezius muscle strain and Parkinson's disease; to the left knee medial meniscus tear surgically treated by meniscectomy (a previously accepted claim); and to appellant's preexisting, pre-1987 diseases of bronchial asthma, chronic obstructive pulmonary disease, anxiety neurodermatitis, angioneurotic edema and pan-sinusitis.

[12] The hearing representative noted that it should be added to the record. The Board notes that it was not so added.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[13] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate or modify compensation without establishing that the disability has ceased or diminished or that it is no longer related to the employment.[14] This includes the modification of appellant's compensation to reflect his wage-earning capacity.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[15] The degree of appellant's physical impairment, however, must be established by the weight of the medical evidence.

In the instant case, Dr. Rivera opined in multiple opinions that appellant was totally and permanently disabled due to his work-related injuries and their sequelae. He testified that appellant's condition after 1987 had not remained the same but had deteriorated markedly, with his osteoarthritis being accelerated and becoming more painful more frequently and he opined that appellant could not "hold a job for four hours, much less than eight" and that appellant would be incapable of performing any of the tasks of an order clerk. This opinion was based upon his examinations and treatment of appellant since 1961.

Dr. Brandon opined after a single examination that appellant was only partially disabled and could work sedentary duty eight hours per day. He based this opinion on a functional capacity evaluation which was not part of the record and hence the record contains no rationale for this opinion. Dr. Brandon, further, merely summarized his physical examination results and did not provide any explanation as to how his examination results supported this conclusion. Therefore Dr. Brandon's narrative was unrationalized. He did not discuss specifically whether appellant remained disabled in any part with relation to his accepted conditions of low back sprain, left ankle sprain and left knee sprain and did not address whether appellant's aggravation of preexisting disc disease remained static, had improved or had worsened. Dr. Brandon further gave appellant's work limitations on an OWCP-5c form by stating "see functional capacity report" which had not been submitted to the record and hence this reference was unrationalized and the basis for the activity restrictions was unsupported by the case record. As his reports are unrationalized and unsupported by the evidence of record, even though he is a Board-certified orthopedic surgeon, his opinions cannot constitute the weight of the medical evidence of record.[16] Therefore, Dr. Brandon's opinions merely create a conflict in medical opinion

[13] *Harold S. McGough*, 36 ECAB 332 (1984).

[14] *See Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[15] *See generally* 5 U.S.C. § 8115(a); A. Larson *The Law of Workmen's Compensation* § 57.22 (1989); *see also Bettye F. Wade*, 37 ECAB 556 (1986).

[16] *See generally John T. Russell, II*, 46 ECAB 536 (1995); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Connie Johns*, 44 ECAB 560 (1993) (medical reports not containing rationale are of reduced probative value).

evidence on the issue of whether or not appellant remains totally disabled to his accepted employment-related injuries.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

Consequently, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether appellant remains totally disabled due to his accepted employment-related injuries and their sequelae and/or preexisting conditions and their sequelae and if not, what appellant's functional capacities in the workplace would be.

Consequently, the decisions of the Office of Workers' Compensation Programs dated December 5, April 26 and April 21, 1997 are hereby set aside and the case is remanded for further development in accordance with this decision and order of the Board.

Dated, Washington, D.C.
April 5, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member