U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT MANNERING and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Alemeda, CA

Docket No. 99-66; Submitted on the Record;
Issued June 13, 2000

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had a 52 percent loss of wage-earning capacity based on his actual earnings.

On April 26, 1994 appellant, then a 49-year-old retired fire chief, filed a claim for compensation due to his cardiac condition. He related his condition to his work as a firefighter and a fire chief, inhaling smoke and fumes without a breathing apparatus, responding to emergency calls while working a schedule of 24 hours on and 24 hours off, negotiating with unions, handling unfair labor complaints and equal opportunity complaints, and trying to manage the employing establishment while funds for performing work were being reduced. The employing establishment indicated that appellant stopped working in March 1990. Appellant submitted numerous medical reports including a March 25, 1991 report from Dr. Neal White, a Board-certified cardiologist, who indicated that appellant underwent cardiac catheterization which showed high grade stenosis of the left anterior ascending artery and the right coronary artery. Appellant underwent coronary angioplasty the same day. He underwent angioplasty again on June 1, 1992. In a January 16, 1995 report, Dr. White stated that appellant's work as a firefighter could be a risk factor for coronary disease due to smoke inhalation and stress in the job. In a February 14, 1995 report, Dr. Robert N. Deutscher, a Board-certified cardiologist, diagnosed arteriosclerotic heart disease with a history of angina pectoris. Dr. Deutscher stated that the stresses and strains of a firefighter could be an aggravating factor in accelerating coronary artery disease.

The Office referred appellant's case record and a statement of accepted facts to Dr. Maurice Eliaser, a Board-certified cardiologist and Office consultant, for his opinion on whether appellant's condition was causally related to his employment. In an April 17, 1995 memorandum, Dr. Eliaser diagnosed ischemic heart disease, initially manifested as angina pectoris. He noted that appellant's symptoms did not appear until after his retirement.

Dr. Eliaser concluded that there was no evidence that the diagnosed condition was medically connected to the factors of employment cited in the statement of accepted facts.

In a May 1, 1995 decision, the Office rejected appellant's claim on the grounds that evidence of record failed to establish that appellant's cardiac condition was causally related to factors of his federal employment. In a May 15, 1995 letter, appellant requested a hearing before an Office hearing representative which was conducted on December 15, 1995. In an April 4, 1996 decision, the Office hearing representative found that there existed a conflict in the medical evidence. He set aside the Office's May 1, 1995 decision and remanded the case for referral of appellant to an impartial medical specialist for an examination and opinion on whether appellant's employment was casually related to the factors of his employment.

In a June 17, 1996 report, Dr. Carl Jeffrey Carlson, a Board-certified cardiologist selected as an impartial medical specialist, diagnosed coronary artery disease. Dr. Carlson concluded that appellant's condition was aggravated and accelerated by his employment due to psychological factors associated with his occupation as a firefighter, the emotional stress related to fighting fires and actual physical factors related to his fire fighting such as toxic chemical exposure. He stated that stress and the physical effects of fire fighting left a permanent impact on the development on coronary disease. Dr. Carlson commented that even if the stress stopped, the diseased blood vessel would remain. He indicated that appellant's total disability continued after his retirement and his underlying coronary disease was a lifelong problem that was only partially reversible. Dr. Carlson stated that appellant could not perform the duties of his former position. He indicated appellant was physically capable of performing other employment that would not involve time stress, physical stress and emotional stress of those duties.

In a July 9, 1996 letter, the Office informed appellant that it had accepted his claim for acceleration of coronary artery disease. In an October 30, 1996 decision, the Office found that appellant had a 52 percent loss of wage-earning capacity based on his actual earnings, beginning effective January 1, 1993, as the president of a small chain of family pizza restaurants. The Office paid temporary total disability compensation for the period March 23, 1991 through December 31, 1992 and paid compensation pursuant to the loss of wage-earning capacity determination effective January 1, 1993. The Office found that appellant would be paid compensation based on the loss of wage-earning capacity even though he had ceased self-employment on July 15, 1996.

In an October 14, 1997 letter, appellant requested reconsideration. In an October 21, 1997 merit decision, the Office denied appellant's request for modification.

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

Under section 8115(a) of the Federal Employees' Compensation Act,[1] the Office, in determining compensation for partial disability, is required to use the actual earnings of an employee in determining his wage-earning capacity if the actual earning fairly and reasonably

[1] 5 U.S.C. § 8115(a).

represent his wage-earning capacity. 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 his statements to the Office, appellant indicated that he was the owner of a small group of family pizza restaurants. At the request of the Office, he submitted evidence showing he had earned $22,015.44 in 1995, $28,800.08 in 1994 and $22,153.92 in 1993. Appellant also indicated in a July 15, 1996 reporting form that he had earned $14,676.96 through July 15, 1996. He noted that he employed a manager to handle the day-to-day business. From this information, the Office determined his weekly wage and compared it to the current weekly wage of his former position. Using the *Shadrick*[3] formula, the Office determined that appellant had a 52 percent loss of wage-earning capacity.

In an October 11, 1996 telephone conversation, appellant informed an Office claims examiner that the earnings from the business had ceased in July 1996 since the business was failing. He related that Dr. Carlson had stated to him that he should not be involved in a failing business for medical reasons. The report submitted by Dr. Carlson, however, does not contain any such specific instructions or work restrictions. He indicated that, in strenuous physical activity, appellant's heart rate was not to exceed 70 percent of the maximum predicted heart rate. He noted that there were no restrictions on appellant's ability to perform physical activities which did not require heavy physical exertion. He noted that appellant could not work in stressful situations, commenting that time stress, physical stress, and emotional stress had accelerated and aggravated appellant's coronary disease. He did not state specifically that appellant should cease working as a restaurant owner.

In a November 13, 1996 report, Dr. White diagnosed coronary ischemia and ischemic cardiomyopathy. He indicated that appellant was clinically asymptomatic. Dr. White noted that a recent nuclear study showed no evidence of ishcemia but was notable for the fact that appellant achieved less than 85 percent of his maximum predicted heart rate. He stated that appellant's current disability was influenced by his previous position as a firefighter which could be a risk factor for the development of coronary disease. Dr. White commented that smoke inhalation as well as the stress associated with fire fighting had been felt to be related to the development of coronary disease as well. He indicated that appellant had recently been self-employed in the pizza business and stated that the stress of this position probably aggravated appellant's medical problems. Dr. White advised appellant not to return to the business. He concluded appellant was totally disabled. Dr. White's determination that appellant was unemployable, however, is not supported by the medical evidence he presented. While he diagnosed a cardiac condition, Dr. White reported that appellant currently was asymptomatic. He stated that the stress of running the pizza business had aggravated appellant's cardiac condition. However, Dr. White did not explain how the stress of running a business had aggravated appellant's cardiac condition. He also did not point to any aggravation, deterioration, or change in appellant's condition due to the stress of appellant's work in the pizza business, particularly when he had

[2] *Floyd A Gervais*, 40 ECAB 1045 (1989).

[3] 5 ECAB 378 (1953).

just stated that appellant was asymptomatic. Dr. White's conclusion that appellant was totally disabled, therefore, was not supported sufficient by medical rationale. His report is poorly rationalized and thus has insufficient probative value to establish that appellant is unable to work and produce actual earnings. Appellant has not submitted any evidence to show that his actual earnings from his self-employment do not fairly and reasonably represent his wage-earning capacity.

The decision of the Office of Workers' Compensation Programs dated October 21, 1997 is hereby affirmed.

Dated, Washington, D.C.
June 13, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member