U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK J. BRADLEY and DEPARTMENT OF JUSTICE,
DRUG ENFORCEMENT ADMINISTRATION, Miami, FL

Docket No. 98-2526; Submitted on the Record;
Issued October 17, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request for reconsideration.

On July 14, 1977 appellant, then a 33-year-old special agent, sustained a cervical and thoracic strain, subluxation at C3-4 and C5 and intervertebral disc degeneration at L5-S1 with intermittent compressions of right-sided nerve roots of L4-5 and S1 in the performance of duty. He returned to regular duty in August 1977.

On November 8, 1978 appellant sustained subluxations at C3-4 and C5 and intervertebral disc degeneration at L5-S1 with intermittent compression of right-sided nerve roots at L4-5 and S1 when he moved a safe.

In a letter dated July 20, 1981, the employing establishment advised appellant that effective July 21, 1981 he was being placed on limited-duty status due to medical problems, which prevented him from performing his regular duties.

In a report dated July 30, 1981, Dr. Christopher B. Michelsen, a Board-certified orthopedic surgeon, provided a history of appellant's condition and findings on examination and opined that appellant could not perform his regular job as a special agent.

In notes dated March 9, 1982, Dr. Michelsen stated that appellant had some complaints but was not totally disabled. He stated: "There are lots of jobs that he could do, in fact, the only job that he cannot do is that which put[s] him in danger of being killed in the nature of his occupation."

In a work restriction evaluation form dated June 28, 1983, Dr. Claude D. Holmes, a Board-certified orthopedic surgeon, indicated that appellant could work eight hours a day with restrictions including no climbing or squatting, twisting limited to two hours a day, lifting

limited to 10 pounds for no more than four hours a day, bending limited to two hours a day, with intermittent sitting, walking and standing for eight hours a day intermittently.

In a narrative report dated July 1, 1983, Dr. Holmes provided a history of appellant's condition, 1977 and 1978 employment injuries, a history of his course of treatment and detailed findings on examination and stated that appellant was partially disabled. He recommended that appellant be retrained for a sedentary occupation.

In a memorandum to the file dated July 3, 1983, the Office noted that appellant sustained a recurrence of disability on July 21, 1981 due to a change in his duties and this resulted in a subsequent reduction of his earnings as he was no longer receiving AUO (administratively uncontrollable overtime). The Office noted that his pay rate for compensation purposes was $34,762.00, which included AUO pay. The Office divided $34,762.00 by 52 weeks to arrive at a weekly pay rate of $668.50.

In a memorandum dated August 30, 1983, the Office's district medical adviser and a Board-certified internist, Dr. Philip Horn, reviewed Dr. Holmes' July 1, 1983 report and stated his agreement that appellant should be retrained for a sedentary work situation.

In a Form CA-66 (job classification) dated November 3, 1983, an Office claims examiner indicated that appellant was able to perform the job of telephone solicitor taking into consideration his limitations related to his employment injury and all preexisting impairments and pertinent nonmedical factors. The claims examiner noted that the job was a sedentary one which involved soliciting orders for merchandise or services over the telephone, explaining the types of products or services offered, trying to persuade customers to buy using a prepared sales talk, recording information and referring orders to other workers for processing. He noted that he had confirmed the weekly wage for the position from a State Employment Service representative and had also confirmed that the job was performed in sufficient numbers so as to make it reasonably available to appellant within his commuting area.

A November 3, 1983 memorandum of a telephone conference with an employing establishment representative indicated that appellant's pay rate, as of July 20, 1981, the last day that he received AUO pay, was $34,762.00, which included AUO pay. A letter dated November 3, 1983 from the employing establishment confirmed the $34,762.00 amount. In a work sheet dated November 3, 1983, the Office determined that appellant's loss of wage-earning capacity was $534.80 and that he was entitled to compensation benefits amounting to $416.75 per week or $1,667.00 each four weeks.

In a certification of work capacity dated November 8, 1983, Dr. Horn stated that he had fully reviewed the case file and Form CA-66 regarding the physical requirements of the position of telephone solicitor and felt that appellant could perform that position.

By decision dated November 25, 1983, the Office advised appellant that it had determined his wage-earning capacity based upon the position of telephone solicitor and that his loss of wage-earning capacity was $534.80 per week based upon a weekly pay rate of $133.70 for the position of telephone solicitor. His compensation rate for each four weeks was established at $1,667.00.

By letter dated March 9, 1998, appellant requested reconsideration of the Office's November 25, 1983 decision and submitted additional evidence.[1]

By decision dated May 27, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence provided in support of his request was of an immaterial nature and not sufficient to warrant a review of the prior decision dated November 25, 1983 in which the Office determined appellant's wage-earning capacity.[2]

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.[3] As appellant filed his appeal with the Board on August 12, 1998, the only decision properly before the Board is the Office's May 27, 1998 decision denying appellant's request for reconsideration. The Board has no jurisdiction to consider the Office's November 25, 1983 decision denying appellant's claim for compensation benefits.[4]

Section 10.138(b)(1) of the Code of Federal Regulations provides that a claimant may obtain review of the merits of his claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.[5] Section 10.138(b)(2) provides that, when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.[6]

In his March 9, 1998 request for reconsideration, appellant argued that the Office's November 25, 1983 decision was based upon an incorrect annual and weekly rate of pay. In support of this argument, he submitted an undated employing establishment document dated as being received by the Office on November 8, 1983. This document was previously of record.[7] As this document was previously of record, it does not constitute relevant and pertinent evidence

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[1] The Office's Procedure Manual provides that there is no time limit for reconsideration requests for decisions issued prior to June 1, 1987, but that any later decision in which the claimant is advised of the one-year filing requirement for reconsideration (effective for decisions on or after June 1, 1987) will have a one-year time limit. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3.b(2) (May 1996).

[2] The record contains additional evidence, which was not before the Office at the time it issued its May 27, 1998 decision, and, therefore, the Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[3] 20 C.F.R. §§ 501.2(c); 501.3(d)(2).

[4] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[5] 20 C.F.R. § 10.138(b)(1).

[6] 20 C.F.R. § 10.138(b)(2).

[7] The document is undated and indicates that appellant's "current" pay rate for the job held at the date of injury was $29,374.00 per year with an additional amount of $5,576.00 for AUO pay. However, there is no indication as to the date this pay rate was in effect.

not previously considered by the Office and is insufficient to warrant further merit review of the Office's November 25, 1983 decision.

Appellant also argued in his request for reconsideration that the Office failed to consider whether he possessed the vocational qualifications for the job of telephone solicitor. However, appellant has provided no evidence that he did not possess the job skills necessary to perform the job of telephone solicitor. Therefore, this argument is not sufficient to warrant further merit review of the Office's November 25, 1983 decision.

Appellant also argued that the Office improperly based its November 25, 1983 wage-earning capacity decision exclusively on the opinion of the Office's district medical Director that appellant could perform the job of telephone solicitor. However, the record shows that, in addition to the opinion of the district medical Director, the opinions of Drs. Michelsen and Holmes, appellant's attending Board-certified orthopedic surgeons, were considered by the Office in reaching its decision as to whether appellant could perform the job of telephone solicitor. Therefore, appellant's argument is insufficient to warrant reopening the 1983 Office decision for further merit review.

With his request for reconsideration to the Office, appellant submitted medical evidence which, he argued showed that he was not physically capable of performing the job of telephone solicitor. Dr. John R. Mahoney, a Board-certified orthopedic surgeon, provided copies of his clinical treatment notes for appellant for the period June 24, 1980 through October 14, 1993 and the results of his examination of appellant on that date. He stated his opinion that appellant's neck and hip complaints at that time were not causally related to his 1977 and 1978 employment injuries but that his low back problems were related to those injuries and would continue to necessitate certain work restrictions. Dr. Mahoney noted that appellant was currently working eight-hour shifts three times a week as a bartender and that was "about the limit that he can do." He enclosed a copy of a work restriction evaluation form completed in 1993. However, this evidence does not indicate that appellant was not able to perform the telephone solicitor position in 1983 and, therefore, this evidence does not constitute relevant and pertinent evidence not previously considered by the Office requiring a review.

In a form report dated July 9, 1997, Dr. Russell E. Windsor, a Board-certified orthopedic surgeon, indicated that appellant could work for only one hour per day with several restrictions. In a report dated January 16, 1998, Dr. Windsor stated that he first examined appellant on March 5, 1996 for complaints of right leg, hip and spine pain and noted that he had numerous problems related to his spine since 1980 and 1981. He provided findings on examination and stated that appellant was totally disabled. However, these reports do not constitute relevant and pertinent evidence not previously considered by the Office as they do not address the issue as to whether appellant was able to perform the telephone solicitor position in 1983. Therefore, this evidence is not sufficient to require merit review of the Office's November 25, 1983 decision.

Appellant also argued that the Office should accept certain additional medical conditions as causally related to his 1977 and 1978 employment injuries. However, the Office has not

issued a final decision regarding this issue and, therefore, the Board has no jurisdiction to consider it in this appeal.[8]

The decision of the Office of Workers' Compensation Programs dated May 27, 1998 is hereby affirmed.

Dated, Washington, DC
October 17, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member

[8] 20 C.F.R. § 501.2(c).