U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA THOMPSON and U.S. POSTAL SERVICE,
POST OFFICE, Cupertino, CA

Docket No. 99-1164; Submitted on the Record;
Issued September 26, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity; and (2) whether appellant has established entitlement to compensation for total disability commencing September 18, 1998.

In the present case, appellant filed a claim alleging that she sustained injuries on July 5, 1994 when she slipped and fell in the performance of duty. The Office accepted the claim for back contusions and sacroiliac sprain. Appellant returned to a light-duty position, initially part time and then eventually full time by December 1996. In a decision dated February 5, 1998, the Office determined that appellant's actual earnings fairly and reasonably represented her wage-earning capacity.

On September 29, 1998, appellant filed a claim for continuing compensation (Form CA-8) commencing September 18, 1998. In a decision dated December 21, 1998, the Office determined that appellant had not established a recurrence of disability.

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

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity.[1] Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do

[1] 5 U.S.C. § 8115(a).

not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[2]

In this case, the record indicates that appellant had worked full time in a light-duty position from December 23, 1996. There is no evidence that the position was temporary, seasonal, or otherwise inappropriate for a wage-earning capacity determination.[3] As noted above, wages actually earned are generally the best measure of wage-earning capacity. The Board finds that the Office properly determined that appellant's actual earnings represented her wage-earning capacity in this case.[4]

The Board further finds that appellant has not established entitlement to compensation for total disability commencing September 18, 1998.

As noted above, the Office issued a formal wage-earning capacity determination on February 5, 1998. Appellant's subsequent claim for compensation as of September 18, 1998 raises the issue of whether she is requesting modification of the wage-earning capacity determination or claiming a recurrence of disability for a temporary period. When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[5]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[6] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[7]

On appeal appellant asserted briefly that her light-duty job required duties outside her restrictions, but she did not provide additional detail and the record contains no probative evidence on this issue. With respect to the medical evidence, the record does not contain a reasoned medical opinion establishing a change in an employment-related condition causing disability as of September 18, 1998. In a report dated October 21, 1998, Dr. Rudolph Propach, a

[2] *Dennis E. Maddy*, 47 ECAB 259 (1995).

[3] *See Monique L. Love*, 48 ECAB 378 (1997).

[4] Appellant did not specifically request review of the February 5, 1998 decision, but since the issues raised under the December 21, 1998 decision included modification of a wage-earning capacity determination, the Board reviewed the underlying wage-earning capacity determination.

[5] *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[7] *Id.*

family practitioner, diagnosed low back syndrome and stated that appellant was seen on September 17, 1998 for a "recurrence of increased pain." The Board notes that low back syndrome was not an accepted condition and Dr. Propach does not provide a reasoned opinion on causal relationship with the July 5, 1994 injury. Moreover, he does not explain the nature and extent of any increased pain and explain its relationship with an employment-related condition. Dr. Propach also submitted form reports dated September 17 and 18, 1998 (Form CA-17), October 1 and November 9, 1998 (Form CA-20a), which are of little probative value in that they do not provide a reasoned medical opinion on the issue presented.[8] The Board notes that a form report dated October 12, 1998 from Dr. William Hoffman, a chiropractor, is of no probative value. Section 8101(2) of the Act provides that the term '"physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."[9] Dr. Hoffman did not specifically diagnose subluxation as demonstrated by x-ray.

The Board finds that appellant has not submitted sufficient medical evidence to establish a change in the nature and extent of an injury-related condition commencing September 18, 1998. Accordingly, she has not met her burden of proof in this case.

The Board notes that the Office's Branch of Hearings and Review issued a decision after the filing of an appeal in this case. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case, and those Office decisions, which change the status of the decision on appeal are null and void.[10] Therefore, the March 18, 1999 Office decision is found to be null and void. It is also noted that appellant on appeal has discussed evidence that was submitted after the December 21, 1998 Office decision. The Board's jurisdiction on this appeal is limited to evidence that was before the Board at the time of the December 21, 1998 decision.[11]

[8] The checking of a box "yes" in a form report, without additional explanation or rationale, is not sufficient to establish causal relationship. *See Barbara J. Williams*, 40 ECAB 649, 656 (1989).

[9] 5 U.S.C. § 8101(2).

[10] *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

[11] 20 C.F.R. § 501.2(c).

The decisions of the Office of Workers' Compensation Programs dated December 21 and February 5, 1998 are affirmed.

Dated, Washington, DC
September 26, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member