U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOEL M. ROSE and U.S. POSTAL SERVICE,
NOBLES POST OFFICE, Pensacola, FL

Docket No. 00-959; Submitted on the Record;
Issued June 14, 2001

DECISION and ORDER

Before MICHAEL E. GROOM, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the position of modified letter carrier fairly and reasonably represented appellant's wage-earning capacity; and (2) whether the Office of Workers' Compensation Programs properly denied modification of appellant's loss of wage-earning capacity determination.

Appellant, then a 43-year-old postal clerk, filed a traumatic injury claim on April 16, 1994 alleging that, on April 14, 1994, he hurt his lower back when he slipped backwards on a concrete curb. The Office accepted appellant's claim for lumbosacral strain and herniated disc, and appellant received appropriate compensation.

On April 28, 1994 appellant returned to work, accepting a limited-duty position of modified general clerk at his current grade and step.

In a November 22, 1994 report, Dr. Wayne Campbell, a Board-certified orthopedic surgeon, increased appellant's work hours to six a day of light duty and specified no heavy lifting, repetitive bending or prolonged sitting. On January 23, 1995 Dr. Campbell indicated that appellant could return to full duty with no lifting greater than 40 pounds and standing and sitting as tolerated. On January 17, 1995 appellant began working eight hours a day, limited duty.

By letter dated May 23, 1995, the Office advised appellant that he would receive wage-loss compensation through January 17, 1995.

In a May 23, 1995 report, Dr. Campbell indicated that appellant was to continue working eight-hour shifts with frequent position changes allowing for standing, sitting and walking with no heavy lifting.

A March 14, 1996 functional capacity evaluation indicated that appellant could work in a light to medium capacity with no maximal lifting beyond 35 pounds and occasional alterations in the work posture. The report noted that appellant exhibited behavior indicative of symptom

magnification. In a July 14, 1996 treatment note, Dr. Campbell agreed that the functional capacity evaluation demonstrated appellant's ability to perform light to medium work.

In a letter dated July 24, 1996, appellant was offered a modified carrier position at an annual salary of $36,135.00, which he refused.[1]

By decision dated September 19, 1996, the Office found that the position of modified clerk fairly and reasonably represented appellant's wage-earning capacity. Because the salary of the modified position was equal to his preinjury position of letter carrier, the Office found that appellant did not have any loss of wage-earning capacity.

By letter dated September 29, 1996, appellant requested an oral hearing which was held on July 30, 1998.

In June 1997, Dr. R.A. MacBeth, Jr., a Board-certified orthopedic surgeon, indicated that appellant had three operations on his right shoulder and previous surgery years ago in the military. Appellant was hired with shoulder problems as a disabled veteran. Dr. MacBeth added that appellant's right shoulder was not stable and there were signs of acromioclavicular joint disease and subacromial impingement aggravated by his work.

In a letter dated August 21, 1998, the employing establishment indicated that appellant was offered a modified job offer on June 24, 1996 based upon medical documentation indicating his restrictions prevented him from lifting 35 pounds. The employing establishment revised the offer on November 17, 1997, to restrict appellant from reaching above shoulder level with his right hand. Appellant refused to sign the modification, but continued to perform the duties of his modified position.

In a decision dated September 24, 1998, an Office hearing representative affirmed the Office's September 19, 1996 decision, finding that appellant's modified carrier position fairly and reasonably represented his wage-earning capacity.

In a January 7, 1999 progress note, Dr. Richard Adkins, a Board-certified anesthesiologist, indicated that appellant had a series of lumbar epidural steroid injections for bilateral lumbar radiculopathy. He stated that appellant's job seemed to be aggravating his problem and referred him to a surgeon for spinal fusion.

On January 27, 1999 an Office medical adviser reviewed the January 15, 1999 report of Dr. Adkins and indicated that the surgery appeared to be for relief of degenerative disc disease at the L4-5 and L5-S1 levels which was not an accepted condition nor causally related to the accepted condition.

On May 28, 1999 the Office referred appellant for a second opinion on whether the need for surgery resulted from the 1994 work injury.

[1] The Office confirmed with the employing establishment that, while appellant rejected the formal job offer, he was actually performing the duties of the job and working within the restrictions of his physician. The employing establishment also indicated that the job would remain available and was the same job that appellant had performed since January 23, 1995.

In a June 17, 1999 report, Dr. Suanne White-Spunner, a Board-certified orthopedic surgeon, examined appellant and diagnosed herniated disc, lumbar strain with resultant spinal stenosis and progressive worsening of arthritis. She indicated that a lumbar fusion was required as a result of the herniated disc from 1994. Dr. White-Spunner noted appellant actually had minimal preexisting findings of arthritis in 1994 and the herniated disc was a significant contributor to his spinal stenosis. She indicated that, if appellant had not fallen, he may never have progressed to the level where he needed any treatment and certainly not surgical treatment. She noted that his ruptured disc caused misalignment of the facets and ultimately resulted in increased arthritis over time. Dr. White-Spunner also noted that appellant would not have had such significant degenerative findings with the facet hypertrophy and spinal stenosis if he had not ruptured the disc in 1994.

In a June 29, 1999 work capacity evaluation, Dr. White-Spunner indicated that appellant could work eight hours a day with restrictions. The restrictions included four hours a day of sitting, walking, standing and operating a motor vehicle; no reaching above the shoulder or twisting; no pushing, pulling or lifting more than 20 pounds; and no kneeling or climbing.

By letter dated August 29, 1999, appellant requested reconsideration of the September 24, 1998 decision.

In an October 15, 1999 decision, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision.

The Board finds that the Office properly determined that the position of modified letter carrier, held by appellant since January 23, 1995, fairly and reasonably represented his 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 wage-earning capacity.[2] Generally, wages actually earned are the best measure of wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[3]

In this case, the record indicates that appellant was released to work eight hours a day with restrictions on January 23, 1995. He continued to work in a full-time, limited-duty capacity and on September 26, 1996, the Office determined that appellant's current position provided him with a wage-earning capacity equal to the wages held at the time of his injury. There is no indication that the job was part time, seasonal or temporary. Nor is there any evidence that the

[2] 5 U.S.C. § 8115(a).

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

position was unsuitable for a wage-earning capacity determination.[4] The Office thus properly determined, at that time, that appellant had no loss of wage-earning capacity.[5]

The Board also finds that the Office improperly denied modification of its wage-earning capacity determination.

Once the loss of wage-earning capacity 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. The burden of proof is on the party attempting to show modification of the determination.[6]

After the Office properly found that appellant could perform the modified duties of postal carrier, the pertinent medical issue is whether there had been any change in his condition that would render him unable to perform those duties.[7] For a physician's opinion to be relevant on this issue, the physician must address the duties of the selected position.[8] The medical reports submitted from Dr. White-Spunner, an Office referral physician, constitute supporting medical evidence that appellant's employment-related condition had worsened and that he could no longer perform the physical requirements of the modified carrier position.

Dr. White-Spunner indicated that appellant could continue on limited duty but raised his lifting limitation from 35 pounds to 20 pounds. Dr. White-Spunner also recommended a lumbar fusion and provided reasoning to support her opinion that appellant's accepted herniated disc had caused an aggravation and exacerbation of his underlying degenerative arthritis.

Consequently, the case will be remanded to the Office to develop the evidence as appropriate regarding appellant's proper loss of wage-earning capacity. Following such further factual and medical development as is deemed necessary, the Office shall issue a *de novo* decision on this aspect of appellant's claim.

[4] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7 (July 1997).

[5] *See Gregory A. Compton*, 45 ECAB 154 (1993).

[6] *See Don J. Mazurek*, 46 ECAB 447 (1995).

[7] *Phillip S. Deering*, 47 ECAB 692 (1996).

[8] *Id.*

The October 15, 1999 decision of the Office of Workers' Compensation Programs is affirmed in part. The decision is set aside and remanded for further development of the evidence consistent with this decision.

Dated, Washington, DC
June 14, 2001

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member