U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of FRANCISCO BERMUDEZ and DEPARTMENT OF AGRICULTURE, SEQUOIA NATIONAL FOREST, Porterville, CA

*Docket No. 02-1285; Submitted on the Record;*
*Issued December 13, 2002*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective February 25, 2001; and (2) whether the Office properly computed appellant's pay rate for compensation purposes for periods prior to February 25, 2001.

This is the second appeal in this case.[1] On the first appeal, the Board reviewed a December 5, 1997 decision, by which the Office reduced appellant's compensation benefits on the grounds that he had the wage-earning capacity of a cashier/checker. The Board reversed the Office's decision as the evidence of record did not establish that appellant was capable by virtue of his educational background and physical and mental capacity to perform the duties of the cashier/checker position. The Board also found that it was unclear from the record whether the Office ever determined whether appellant was a "career seasonal" employee or an "emergency firefighter" for the purposes of pay rate computation. Therefore, the Board directed the Office to clarify appellant's employment status for compensation purposes. The complete facts of this case are set forth in the Board's May 11, 2000 decision and are herein incorporated by reference.

In accordance with the Board's decision, the Office obtained the necessary information to clarify appellant's prior employment status, reinstated his full compensation benefits and continued to manage his claim. By letter dated June 6, 2000, the Office referred appellant together with the case record, a list of questions to be resolved and a statement of accepted facts to Dr. Charles Heller, a Board-certified orthopedic surgeon, for a second opinion evaluation. After reviewing Dr. Heller's report, and additional medical evidence from appellant's treating physician, Dr. Richard L. Pantera, a Board-certified neurologist, the Office issued a notice of proposed termination of compensation on October 31, 2000. By decision dated February 22, 2001, the Office terminated appellant's benefits. By letter dated March 8, 2001, appellant, through counsel, requested an oral hearing before an Office representative, which was held on July 26, 2001. At the hearing, the hearing representative stated that the record would be held open for 30 days to allow the submission of additional evidence. In a decision dated

[1] Docket No. 98-1395 (issued May 11, 2000).

November 1, 2001, an Office hearing representative affirmed the Office's prior decision, noting that no additional evidence had been received from appellant.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective February 25, 2001.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[5]

In this case, appellant's treating Board-certified neurologist, Dr. Richard L. Pantera, continued to support appellant's disability and need for medical treatment due to his accepted condition. In a report dated August 12, 1998, Dr. Pantera diagnosed chronic myofascial syndrome of the left shoulder with chronic pain, noted that appellant had been permanent and stationary for a long time, and stated that appellant could not work according to his symptomatic complaints. He prescribed medication and concluded that there was nothing further he could do for appellant. In a report dated June 28, 2000, Dr. Pantera again diagnosed myofascial syndrome of the shoulder, and noted that appellant would not lift the left arm above the horizontal level due to left deltoid pain and demonstrated generalized decreased range of motion of the left shoulder.

In a report dated June 30, 2000, Dr. Heller, an Office referral physician, noted appellant's history of injury, reviewed the medical evidence of record and performed a physical examination. He diagnosed left shoulder strain by history and stated that appellant had no current objective findings to indicate an active orthopedic diagnosis of his left shoulder or to support his complaints of pain. Dr. Heller added that appellant's subjective complaints were exceedingly exaggerated and reiterated that there were no objective findings to indicate continued residuals of the work injury. He concluded that appellant's prognosis was excellent, that he required no further treatment for his left shoulder, and that regarding his left shoulder, appellant is capable of returning to his usual and customary occupation.

By letter dated July 17, 2000, the Office forwarded Dr. Heller's report to Dr. Pantera and asked him to comment. In a response dated August 8, 2000, Dr. Pantera stated:

> "I have reviewed Dr. Heller's report. In my previous reports I have also documented that [appellant] had no objective findings of disability. He refuses to do certain motions due to his complaints of pain. He has significant subjective symptoms of disability.

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

[4] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[5] *Id.*

"In my note of October 9, 1997, I documented an exaggerated pain response. This has remained ever since that time.

"Subjectively [appellant] will complain that he cannot perform his prior occupation. Based upon the objective findings there would be no such restriction."

The Board finds that the weight of the medical opinion evidence rests with Dr. Heller's well-rationalized narrative report. Dr. Heller provided a history of injury and appellant's medical history, reviewed the results of early tests and performed a complete physical examination. He noted that there were no objective signs of appellant's accepted left shoulder condition and added that appellant had no continued residuals of the July 23, 1990 work injury. Further, Dr. Heller stated that no further treatment was required for the left shoulder condition, and that appellant was capable of performing his usual and customary occupation. Therefore, the Office properly relied on Dr. Heller's report in terminating appellant's benefits. Furthermore, the record contains no contrary probative medical evidence to indicate that appellant has any residual disability or need for medical treatment due to his accepted conditions, as appellant's treating physician specifically stated in his August 8, 2000 report that he agreed with Dr. Heller that there were no objective findings which would prevent appellant from performing his prior occupation. As both Drs. Heller and Pantera concluded that appellant has no objective findings of disability causally related to his employment which would prevent him from returning to his former occupation, the Office met its burden of proof to terminate appellant's compensation benefits effective February 25, 2001.

The Board further finds that the Office properly determined appellant's employment status, and therefore properly computed appellant's pay rate for compensation purposes for periods prior to February 25, 2001 to which he was entitled to benefits.

Sections 8114(d)(1) and (2) of the Federal Employees' Compensation Act provide for computation of pay rates for compensation purposes, specifying methods of computation of pay for employees who worked in the employment for substantially the whole year prior to the date of injury and for employees who did not work the majority of the preceding year, but for whom the position would be available for a substantial portion of the following year.[6] Section 8114(d)(3) of the Act provides an alternative method for determination of pay to be used for compensation purposes, when the methods provided in the foregoing sections of the Act cannot be applied reasonable and fairly.[7]

Section 8114(d)(3) provides:

"[T]he average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or

[6] 5 U.S.C. § 8114(d)(1), (2).

[7] 5 U.S.C. § 8114(d).

other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within 1 year immediately preceding his injury."

The purpose of section 8114(d)(3) is to determine the annual earning capacity for an employee that closely approximates his or her true preinjury earning capacity. The Board has held that the Office must consider the factors listed in section 8114(d)(3) prior to application of the 150 times statutory minimum calculation.[8]

In this case, appellant's position as an emergency firefighter would not have provided him with employment for substantially the whole year. Therefore, in its original decision, the Office properly determined that appellant's pay should be calculated under section 8114(d)(3) of the Act. In its original decision the Office then applied a formula set forth in the Federal (FECA) Procedure Manual to aid in the application of section 8114(d)(3) to emergency firefighters. The Board held, however, that it was unclear from the record whether the Office ever considered whether appellant might have been a "career seasonal" employee, which requires a different method of pay rate computation and directed the Office to clarify appellant's employment status.

On remand, in accordance with the Board's prior decision, by letters dated June 5, 2000 and August 23, 2000, the Office contacted the employing establishment to clarify whether appellant was a simple emergency firefighter or a career seasonal employee, and further asked the employing establishment to specify the wages paid to similarly employed individuals during 1990, as required by the Act.

In a response dated February 21, 2001, the employing establishment explained that appellant was employed on a rotational "call when needed" basis, working only if and when there was a fire. Appellant was paid at the base rate for all hours worked, and did not receive overtime, differentials or hazard pay. The employing establishment further specified that appellant was hired under the administratively determined authority authorized by Congress for emergency firefighting, that no SF-50 was accomplished, and that appellant was an AD employee and not a seasonal employee. Work was not guaranteed every year, but rather each year the crew sector leader, responsible for recruiting ADs, called the AD employees when notified that a crew was needed by the forest service. The employing establishment explained that there are approximately 400 ADs and they do not always get called. Their employment depends on whether the sector leader calls them, and whether they are at home, and available, at the time of the call. The employing establishment stated that the pay rate for an AD-2 employee of the same grade and step that appellant held on the date of injury would be the same as appellant's pay rate at the time of his injury, $7.98 per hour, and that the average number of hours worked at that pay rate per year would have been 500. In response to the Office's request to provide the earnings of another AD-2 Firefighter working the greatest number of hours during the period July 22, 1989 to July 22, 1990 (the year prior to the date of injury), in the same or similar class and in the same neighboring locality, the employing establishment explained that this was difficult as so much time had elapsed. The employing establishment stated that the closest information they could offer was the 1987 information on an AD-4 crew boss, who would have gone to the greatest number of fires and therefore worked the greatest number of hours and had worked 504.75 hours.

[8] *Monte Fuller*, 51 ECAB 571 (2000).

As the information from the employing establishment clearly establishes that appellant was not a career seasonal employee, the Board finds that, in its February 22, 2001 and November 1, 2001 decisions, the Office properly computed appellant's pay rate pursuant to the emergency firefighters section of the procedure manual and he is not due additional compensation based on the wages of a career seasonal employee.[9]

The decisions of the Office of Workers' Compensation Programs dated November 1 and February 22, 2001 are hereby affirmed.[10]

Dated, Washington, DC
December 13, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Computing Compensation*, Chapter 2.901(b)(2) (December 1995).

[10] The Board notes that subsequent to the Office hearing representative's November 1, 2001 decision, by letter dated November 26, 2001, and sent by facsimile to the Office hearing representative's attention that same date, appellant's counsel requested reconsideration of the Office's decision on the grounds that all of appellant's medical evidence had not been considered and that the Office had erred in finding appellant to be an emergency firefighter, rather than a career seasonal employee. Counsel asserted that by facsimile dated September 8, 2001, she submitted the September 6, 2001 medical report of Dr. Michael Bronshvag, and, therefore, that the Office hearing representative was incorrect in stating in the decision that no additional evidence had been received from appellant. In support of her request, counsel submitted a copy of the first page of Dr. Bronshvag's September 6, 2001 report, which has a "Transaction Report" across the lower portion, noting that a facsimile was sent on September 8, 2001 to fax number 202-693-1386. In a separate November 26, 2001 letter to the Chief of the Branch of Hearings and Review, sent by facsimile on November 30, 2001, counsel again noted that Dr. Bronshvag's report had been submitted but had been overlooked. Counsel also asserted that the hearing representative had failed to follow the Board's instructions regarding the recomputation of appellant's pay. In a letter of response dated December 26, 2001, the Assistant Chief of the Branch of Hearings and Review stated that it had received appellant's November 26, 2001 and November 30, 2001 facsimiles, however, there was no evidence in the record that Dr. Bronshvag's report had ever been received. The Office instructed appellant to follow the appeal rights contained in the prior decision, if desired. The Board notes that consistent with the Office's December 26, 2001 letter, the record before it contains only the partial first page of Dr. Bronshvag's report, faxed to the Office on November 26, 2001, and does not contain a complete copy of this report. However, as the Office has not issued a formal decision in response to appellant's outstanding November 26 and 30, 2001 reconsideration requests, the Board does not have jurisdiction over this issue. *Algimantas Bumelis*, 48 ECAB 679 (1997).