U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LUTHER J. CAMP and DEPARTMENT OF THE ARMY, TRAINING SUPPORT CENTER, Fort Bragg, NC

Docket No. 00-2065; Submitted on the Record;
Issued February 7, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of recreation aide represented appellant's wage-earning capacity as of March 29, 1999; and (2) whether the Office properly computed appellant's compensation rate effective March 29, 1999.

On October 2, 1990 appellant, then a 50-year-old electronics technician, fell from a ladder and sustained a right shoulder strain, right rotator cuff tear and a tear of the supraspinatus, requiring surgical repair on May 10, 1991.[1] Appellant was off work from October 3 to 28, 1990, returned to work on October 29, 1990 and stopped work again on November 8, 1990. He began receiving compensation on March 16, 1991, and was off work through September 10, 1991. He returned to light duty in a permanent, full-time position on September 11, 1991. As of January 29, 1991, his pay rate was $571.92 per week, at the GS-9, step 8 pay rate.

At some point after his return to full-time employment on September 11, 1991, appellant's schedule was reduced to 32 hours a week. He continued to work part-time light duty through January 23, 1992,[2] took sick leave from January to July 22, 1992, and elected disability

[1] Dr. Glen D. Subin, an attending Board-certified orthopedic surgeon, performed an anterior acromioplasty with rotator cuff repair on May 10, 1991.

[2] By decision dated February 5, 1992, the Office awarded appellant a schedule award for a 10 percent permanent impairment of the right arm, with an award period of November 17, 1991 to June 22, 1992.

retirement effective July 23, 1992.[3] The Office accepted that appellant sustained a recurrence of disability beginning July 23, 1992. On August 29, 1995 appellant elected to receive wage-loss benefits effective July 23, 1992.[4]

In an October 19, 1995 report, Dr. Fred Benedict, a Board-certified orthopedic surgeon and impartial medical examiner, opined that appellant had a 30 percent permanent impairment of the right upper extremity according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (third edition).

In an August 21, 1998 report, Dr. Gwenesta B. Melton, an attending Board-certified internist specializing in rheumatology, opined that appellant was capable of performing extremely light duty for four hours a day.

On March 8, 1999 the Office offered appellant a light-duty position as a recreation aide. Duties included screening surveillance monitors, maintaining log books weighing less than three pounds, answering the telephone, and occasionally issuing towels and basketballs to patrons. The position was classified as GS-2, step 10, with an hourly pay of $9.59 or $20,017.00 a year.

In March 10 and 11, 1999 reports, Dr. Melton released appellant to work for four hours a day, with "no prolonged standing, walking, bending or sitting." Dr. Melton noted that appellant would "not be able to use his right arm very much," and could not reach above the shoulder or perform fine manipulation. She limited simple grasping to 30 minutes a day. Dr. Melton noted that appellant had "limitations of his right shoulder" due to the October 2, 1990 rotator cuff tear, that "if exceeded, will cause him severe pain for several weeks." Dr. Melton opined that appellant had reached maximum medical improvement.[5]

On March 17, 1999 appellant accepted the offered position and returned to work on March 29, 1999, working four hours a day, five days a week from March 29 to June 24, 1999.

In an April 14, 1999 worksheet, the Office used the October 2, 1990 date-of-injury pay rate of $586.02 to determine appellant's compensation beginning March 29, 1999.

On May 18, 1999 appellant claimed an increased schedule award.

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[3] In an October 18, 1991 letter, the employing establishment noted that a fitness-for-duty examination showed that appellant could use only his left arm. It was recommended that he apply for disability retirement. In a December 11, 1991 notice, the employing establishment advised appellant that it proposed to terminate him from employment due to his disability. The employing establishment stated that there was no light-duty work available for him within his restrictions. On July 11, 1995 appellant filed a claim for a July 20, 1992 recurrence of disability.

[4] Appellant provided statements of income and employment dated March 11, 1996, March 5, 1997 and February 10, 1998 stating that he had not worked within the 15 months prior to these dates. In a May 22, 2000 form, he noted that he and his wife owned a tobacco farm which they leased to another farmer. Appellant stated that his wife took care of all details concerning the farm, which operated at a loss.

[5] In a March 17, 1999 report, Dr. Melton stated that the October 2, 1990 rotator cuff tear remained symptomatic and that appellant had a permanent impairment of the right upper extremity.

By decision dated June 3, 1999, the Office found that the position of recreation aide fairly and reasonably represented appellant's wage-earning capacity. The Office found that since March 29, 1999, appellant had earned $9.59 an hour for 20 hours a week, with a current weekly pay rate for the date-of-injury position of $586.02, and an adjusted earning capacity a week of $140.64. The Office determined that this resulted in a loss of wage-earning capacity of $445.38 a week. Multiplying this figure by the 75 percent compensation rate, the Office found a $334.04 loss of wage-earning capacity, with cost-of-living increases, adjusted upward to $406.25, or $1,625.00 every four weeks, minus insurance premiums, for total compensation in the amount of $1,491.36 every four weeks.[6]

In a June 24, 1999 letter, appellant disagreed with the June 3, 1999 decision and requested an oral hearing. He asserted that the Office calculated his compensation incorrectly because he was a GS-9, step 9 on the date of his recurrence of disability. Appellant later requested a review of the written record in lieu of an oral hearing.

Appellant filed claims for wage-loss compensation from June 24 to December 24, 1999.

In July 2 and 6, 1999 reports, Dr. Melton stated that as of a June 24, 1999 examination, appellant had sustained a recurrence of his October 2, 1990 right shoulder injury "attributed to his current work condition," as he was required to "put weight on right shoulder frequently which weakened it." He asserted that appellant was made to work outside of his prescribed restrictions, causing a reinjury to the right shoulder and an "increase in shoulder pains secondary to his work." Dr. Melton also noted that prolonged sitting and standing aggravated the osteoarthritis in his knees." He held appellant off work for six months as his job had "exacerbated" the October 2, 1990 shoulder injury.

In a July 12, 1999 letter, Ann Talbot, appellant's supervisor, stated that, since March 29, 1999, appellant had ably performed the duties of checking identification, greeting customers, answering the telephone, issuing basketballs and towels. Ms. Talbot stated that, upon appellant's return to work, he would be provided with a desk telephone as opposed to the present wall telephone to eliminate any reaching and with a backless stool, as he had complained that his right elbow rubbed against the stool back.

On July 13, 1999 appellant filed a claim for a June 24, 1999 recurrence of disability, which he characterized as an "aggravation of osteoarthritis." On the reverse of the form, Ms. Talbot noted that, on June 28, 1999, appellant stated that his "knee and right elbow hurt from rubbing the back of the stool."

In a July 14, 1999 letter, Ms. Talbot stated that appellant worked from March 29 to June 27, 1999 without complaint, then brought Dr. Melton's report holding off work for six months on July 7, 1999.

[6] On June 23, 1999 the employing establishment issued appellant a notice of reprimand for threatening Daphne Jordan, an employing establishment compensation administrator, during a May 18, 1999 telephone conversation.

On August 23, 1999 appellant filed a claim for continuing compensation benefits beginning that day.[7]

In October 18 and 20, 1999 reports, Dr. Melton stated that appellant still had symptoms related to the October 2, 1990 right shoulder injury, that "frequent standing, sitting, lifting caused acceleration of right shoulder, knee condition," and found him totally disabled for work. He reiterated these statements in a March 6, 2000 report.

By decision dated April 17, 2000, the Office hearing representative affirmed the June 3, 1999 decision, in part, finding that the position of recreation clerk fairly and reasonably represented appellant's wage-earning capacity. The hearing representative further found that the Office had erred in computing appellant's compensation as a recreation aide based on his date-of-injury pay rate, as the recurrent pay rate should have been used under section 8101(4) of the Federal Employees' Compensation Act. The hearing representative noted that the Office used the October 2, 1990 date of injury pay rate, and not the pay rate of the position appellant held as of January 23, 1992, the date of his recurrence of disability. The hearing representative stated that he contacted the employing establishment on April 12, 2000, and found that the current pay rate for the date of recurrence position was $19.52, while the current pay rate for the date-of-injury position was $16.26. The hearing representative returned the case to the Office for payment of compensation based on the recurrent pay rate and adjudication of the June 24, 1999 recurrence claim and appellant's claim for an increased schedule award.[8]

Appellant filed his appeal with the Board on June 9, 2000.

By decision dated June 20, 2000, the Office denied appellant's claim for a recurrence of disability on the grounds that causal relationship was not established. The Office found that appellant submitted insufficient rationalized medical evidence explaining how the October 2, 1990 injury would totally disable him for work on and after June 3, 1999. The Office further found that Dr. Melton's reports were insufficiently rationalized to establish causal relationship, and that appellant did not submit evidence corroborating that he was made to work outside of his restrictions. The Office noted that appellant did not respond to the Office's July 21, 1999 letter which instructed him to submit a report from his attending physician containing medical rationale addressing causal relationship.

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

[7] In an October 12, 1999 decision, the Merit Systems Protection Board (MSPB) directed that appellant's case be replaced on the compensation rolls pending the outcome of an administrative appeal. The Board finds that the MSPB decision, as well as the decisions of other administrative agencies, are not binding on the Office. *Stephen R. Lubin*, 43 ECAB 564 (1992).

[8] In a May 26, 2000 file memorandum, the Office noted that appellant's referral to an impartial medical examiner to determine the percentage of any work-related permanent impairments would be postponed as appellant filed his appeal with the Board.

Under section 8115(a) of the 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.[9] Generally, wages actually earned are the best measure of a wage-earning capacity, absent evidence to the contrary.[10]

In this case, the record indicates that appellant worked in the recreation aide position from March 29 to June 24, 1999, a period of more than two months prior to the Office's June 3, 1999 wage-earning capacity determination. The position was within the medical restrictions provided by Dr. Melton, appellant's attending rheumatologist, on March 10 and 11, 1999.

The Board notes that the recreation aide position was part-time, for 20 hours a week. The Board had held that a part-time position is not considered suitable reemployment unless the claimant was a part-time worker at the time of injury.[11] In this case, the elements of appellant's date-of-injury position are superseded by those of his job at the time of the July 23, 1992 recurrence of disability. When appellant stopped work in January 1992, he was working a 32-hour tour per week, less than a full-time, 40-hour position. Thus, the Board finds that the recreation position is not precluded from being termed suitable work merely because it was part time, as appellant was working part time when he experienced a recurrence of total disability. Also, there is no indication that the recreation aide job was seasonal or temporary, or that the position was otherwise unsuitable for a wage-earning capacity determination.[12] Accordingly, the Board finds that the position fairly and reasonably represented appellant's wage-earning capacity.

The Board finds that the Office improperly computed appellant's compensation effective March 29, 1999.

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[13] Section 8101(4) of the Act defines "monthly pay" as "the monthly pay at the time of injury or the monthly pay at the time disability begins, or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater."[14] In *George Crowley*,[15] the Board held that section 8101(4) entitles claimants to the greater of the three pay rates.

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[9] 5 USC § 8115(a).

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

[11] *Penny L. Baggett*, 50 ECAB 559 (1999).

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

[13] 5 U.S.C. § 8105(a).

[14] 5 U.S.C. § 8101(4).

[15] 34 ECAB 988 (1983).

The Office's selection of the date of disability as the appropriate date for calculation of appellant's monthly pay was inappropriate, as the rate of pay on the date of his recurrence of disability was higher. As appellant's disability increased on July 23, 1992 from partial to total, he had a recurrence of disability within the meaning of the Federal Employees' Compensation Act on that date.[16] As noted above, appellant resumed regular full-time employment with the employing establishment on September 11, 1991 and is, therefore, eligible for a recurrent pay rate for his subsequent recurrence of disability on June 24, 1999.

The hearing representative stated that he contacted the employing establishment on April 12, 2000, and found that the current pay rate for the date-of-recurrence position was $19.52, while the current pay rate for the date-of-injury position was $16.26. The Office should have used the higher, recurrent pay rate in calculating the amount of compensation to which appellant was entitled for his loss of wage-earning capacity.[17] Therefore, the case must be returned to the Office for calculation of the appropriate rate of compensation and prompt payment of all compensation due and owing for the underpayment of compensation beginning on July 24, 1992.

The April 17, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed and the case is returned to the Office for further action consistent with this opinion.

Dated, Washington, DC
February 7, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[16] *Thomas Donaghue*, 39 ECAB 336 (1988).

[17] *Johnny A. Muro*, 17 ECAB 537 (1966).