U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of REX S. HULTZ and U.S. POSTAL SERVICE,
POST OFFICE, San Diego, CA

Docket No. 00-2279; Submitted on the Record;
Issued February 25, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of modified window and distribution clerk fairly and reasonably represented appellant's wage-earning capacity; and (2) whether the Office abused its discretion in denying appellant's request for reconsideration.

The Office accepted that appellant, then a 50-year-old modified window distribution clerk, sustained the conditions of low back strain, acute left knee strain and left knee internal derangement on March 17, 1997 when he fell while removing a spare tire from a cluttered storeroom. The Office authorized left knee surgery, which was performed on August 18, 1997. The record indicates that appellant remained off work following surgery from August 18, 1997 to May 7, 1998. Appropriate compensation was paid.

On May 6, 1998 the employing establishment offered appellant a temporary light-duty part-time position as a modified window distribution clerk in conjunction with the March 31, 1998 restrictions of Dr. Ronald Portnoff, his attending Board-certified orthopedic physician,[1] who indicated that appellant might be able to return to full-time work in approximately two months. In a May 7, 1998 letter, the Office found the position suitable based on appellant's medical restrictions. The record indicates that appellant returned to work on May 8, 1998.

In a report dated April 30, 1998, Dr. Fredrick J. Lieb, a Board-certified orthopedic specialist and Office referral physician, reviewed the medical evidence of record, together with a statement of accepted facts. After setting forth examination findings, Dr. Lieb diagnosed a resolved low back strain; left knee strain with left internal derangement; status post arthroscopic

[1] The record indicates that in facilitating the process of returning appellant to work, appellant expressed concern over returning to an uninteresting, light-duty job where he would be unable to use any of his abilities and/or computer skills. Appellant was essentially informed that he must return to his duty station in the craft in which he is currently employed and would need to bid for another position (such as a technical or computer job) when such a position became available.

surgery of the left knee and chondromalacia patella, left knee, mild. He stated that objective findings did not support appellant's subjective complaints from an orthopedic standpoint. Dr. Lieb listed nonorganic findings, suggesting symptom magnification. Based on his physical examination, Dr. Lieb found no evidence of radiculopathy or nerve damage. He opined that the chondromalacia of the left patella was largely secondary to appellant's prior motorcycle accident in 1988 which required an open arthrotomy. This preexisting condition may have been temporarily aggravated by the March 17, 1997 work-related injury, but Dr. Lieb expressed doubt that appellant's current condition would have been any different absent the March 17, 1997 industrial injury to the left knee. Based upon his medical review, Dr. Lieb stated that a magnetic resonance imagining (MRI) scan of the lumbar spine demonstrated degenerative disc disease, which was consistent with appellant's age and as a result of the natural progression of the degenerative process. Dr. Lieb opined that this condition was not precipitated, aggravated, accelerated or the result of direct cause by virtue of the March 17, 1997 industrial accident. There was no evidence of a herniated nucleus pulposus. Dr. Lieb opined that the only continuing medical residual of the March 17, 1997 work injury was some degree of chondromalacia of the left knee patella but he suspected that this condition was preexisting as a result of a nonindustrial 1988 motorcycle accident. Dr. Lieb further opined that appellant fully recovered from his industrial low back strain. He opined that appellant was physically capable of performing his usual and customary employment on a full-time basis without restrictions.

In a July 24, 1998 medical report, Dr. Robert Moore, a Board-certified neurologist, stated that he reviewed Dr. Lieb's April 30, 1998 report and found Dr. Lieb's observations and diagnoses consistent to his own. He noted that there was a question of herpetic neuralgia, which might be responsible for appellant's sensory symptomatology, but stated that this was on a nonindustrial basis. Based on appellant's orthopedic and neurologic findings, Dr. Moore opined that appellant was able to engage in full-time work.

In a September 10, 1998 report, Dr. Portnoff advised that appellant should continue with his part-time work. Following an examination, he diagnosed status post arthroscopic surgery left knee with medial and lateral meniscectomy, synovectomy, chondromalacia and synovitis, moderately severe; low back pain with lumbar disc disease at L3-4, L4-5 with associated radicular symptoms and bursitis involving the right shoulder, rotator cuff and recent onset. Dr. Portnoff advised that appellant has been taking analgesics and muscle relaxants and may require an injection into the shoulder and repeat epidural lumbar blocks. He additionally stated that any further care on the knee would require an arthroplasty replacement. On October 2, 1998 Dr. Portnoff requested authorization from the Office to perform a total knee replacement of appellant's left knee.

The Office determined that a conflict in medical opinion existed regarding whether appellant had continuing residuals of his accepted condition and referred appellant, together with a statement of accepted facts, questions and medical records to Dr. George Glancz for an impartial medical evaluation. In a report dated December 4, 1998, Dr. Glancz set forth his examination findings and diagnosed status post arthroscopy and arthrotomy of the left knee times two, degenerative arthritis and chondromalacia of the left knee, disc protusion at L3-4 and L4-5 and disc bulging at L5-S1, cervical strain syndrome, resolved. Dr. Glancz found no evidence of neurological damage to the back resulting in extremity problems. He did find that appellant had complaints of moderate pain in the left knee area that constantly interferes with prolonged

standing, walking, climbing, squatting and kneeling. Dr. Glancz opined that this new condition represents an aggravation and precipitation of a preexisting problem with appellant's left knee. Based on his review of the records and appellant's history, he opined that the industrial injury caused permanent damage to appellant's left knee causing the need for surgery and increased pain that was not present prior to the injury and still continues to affect appellant. He noted that appellant's condition did not return to what would have been the normal course of the disease without any work history. Dr. Glancz stated that the objective evidence supports appellant's subjective complaints. He disagreed with Dr. Leib's opinion that the industrial injury to appellant's left knee caused only temporary damage, based on the fact that prior to the injury appellant could do daily exercises, play tennis, walk and run without difficulty and after the injury, the pain in his left knee increased to the point that he is unable to do any of the previous activities. Dr. Glancz further opined that appellant's low back injury was entirely work related as there was no evidence of problems with the lower back prior to the injury of March 17, 1997. He advised that appellant was able to work full time, but he could not advise whether he could perform his regular duties as the statement of accepted facts did not include appellant's job analysis. Dr. Glancz stated that appellant's work restrictions should involve no prolonged standing, prolonged walking, frequent climbing, squatting and kneeling. Appellant should also refrain prophylactically from very heavy lifting. He advised that appellant would need additional treatment on an industrial basis in regards to his low back condition in case his condition worsens and recommended access to an orthopedic surgeon. Dr. Glancz further advised that appellant would need continuous treatment in regard to his left knee on an industrial basis, including anti-inflammatory medication and hemiarthroplasty surgery if his condition deteriorates further. A Form OWCP-5c outlining appellant's restrictions was provided.

In a December 7, 1998 report, Dr. Portnoff set forth his examination findings of appellant's left knee and lumbar spine. A recommendation for a total joint replacement for the left knee was provided. Subsequent reports provided the same recommendations.

On February 22, 1999 the employing establishment offered appellant a modified window and distribution clerk position (part-time flex) for 36 hours work/per week effective March 1, 1999. The duties included case distribution mail using restbar to allow sitting and standing, case box mail, Nixies, work window using stool to allow for sitting and standing and computer input. The restrictions identified were: lifting up to 20 pounds; stand/walk intermittently up to 2 hours per day; sit intermittently up to 4 hours per day and perform simple grasping; fine manipulation and reaching above the shoulder up to 4 hours per day. Appellant was to avoid climbing, kneeling, bending, stooping, twisting, pushing and pulling.

In a February 25, 1999 Form CA-17, Dr. Portnoff set forth appellant's restrictions which included: lifting up to 20 pounds; stand/walk intermittently up to 2 hours per day; sit intermittently up to 4 hours per day and perform simple grasping; fine manipulation and reaching above the shoulder up to 4 hours per day. He advised appellant could work 8:00 a.m. to 3:45 p.m. with a half-hour lunch Monday thru Friday for 36 hours until knee replacement surgery April 1999. Dr. Portnoff further wrote on appellant's February 22, 1999 limited-duty job offer appellant's work hours five days per week with no weekend work.

Also on February 25, 1999, appellant accepted the modified window and distribution clerk position. He started this position on March 1, 1999.

In a March 9, 1999 letter, the Office authorized appellant to undergo total knee replacement of his left knee. On March 23, 1999 the Office noted that appellant could not proceed with the knee replacement until results from the MRI scan of appellant's shoulder was obtained.[2]

Dr. Portnoff continued to submit Form CA-17 reports indicating that appellant requires two consecutive days off per week to rest and reduce the swelling of the left knee. As early as April 29, 1999, he restricted appellant's activity of reaching above the shoulder to no more than an hour and a half. This restriction was further limited to no more than one hour of above the shoulder work on May 19, 1999 and reduced to no reaching above the shoulder on March 20, 2000.

By decision dated November 8, 1999, the Office determined that appellant's actual earnings in the modified window and distribution clerk position represented his wage-earning capacity. The Office found that actual earnings met or exceeded the current wages for the date-of-injury position and, therefore, he had no loss of wage-earning capacity.

In a December 8, 1999 letter, appellant's attorney requested reconsideration of the Office's determination that appellant's pay rate fairly and reasonably represented appellant's wage-earning capacity. The attorney stated that appellant's reconsideration request will be based on the fact that appellant had earned in excess of the hourly pay rate deemed to be representative of appellant's wage-earning capacity. Appellant's attorney further stated that he was in the process of gathering supporting facts and documents.

By decision dated April 28, 2000, the Office denied appellant's reconsideration request on the grounds that the attorney's letter neither raised substantive legal questions nor included new and relevant evidence.

The Board finds that the Office properly determined that appellant had no loss of 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 her wage-earning capacity.[3] Generally, wages actually earned are the best measure of a 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.[4]

The Office's procedure manual provides guidelines for determining wage-earning capacity based on actual earnings. To determine whether appellant's work fairly and reasonably represents his or her wage-earning capacity, the claims examiner should consider whether the

[2] The record indicates that appellant filed a separate claim for his shoulder condition.

[3] 5 U.S.C. § 8115(a).

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

kind of appointment and tour of duty[5] are at least equivalent to those of the job held on date of injury. Unless they are, the claims examiner may not consider the work suitable. "For instance, reemployment of a temporary or causal worker in another temporary or causal employing establishment position is proper, as long as it will last at least 90 days and reemployment of a term or transitional employing establishment worker in another term or transitional position is likewise acceptable."[6]

In this case, the record indicates that appellant worked in the light-duty position of modified window and distribution clerk from March 1, 1999. The medical evidence from appellant's treating physician indicates a reduction in appellant's ability to perform over the shoulder work due to a left shoulder condition, however, there is no indication that appellant has lost time from work or that there was a change in appellant's employment-related conditions. Appellant appears to have elected to postpone the total knee replacement of his left knee due to pain in his left shoulder.

The record establishes that appellant worked at the light-duty position for more than 60 days.[7] Appellant was returned to his original schedule of part-time flexible 36 work hours per week consistent with Dr. Portnoff's restrictions. As noted above, actual wages earned are generally the best measure of wage-earning capacity and the Board finds that the Office properly found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. Appellant's current light-duty position, in terms of the kind of appointment and tour of duty, is equivalent to those of the job held on-the-date of injury. Thus, appellant's current work is suitable reemployment which represents his wage-earning capacity. The employing establishment indicated that the actual wages were greater than the current date-of-injury position wages and thus the Office properly determined that appellant had no loss of wage-earning capacity.

The Board finds with respect to the Office's April 28, 2000 decision denying reconsideration, that the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.[8] Section 10.608(b) provides that when an

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.900.3 (July 1997).

[6] *Id.*

[7] Office procedures state that a determination of whether actual earnings fairly and reasonably represented wage-earning capacity should be made after the employee had been working for more than 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.8147(c) (December 1993); *see also Beverly Dukes*, 46 ECAB 1014 (1995); *Corlisia L. Sims (Smith)*, 46 ECAB 172 (1995) (both finding that appellant had not worked the "minimum" 60-day period).

[8] 20 C.F.R. § 10.606(b)(2) (1999).

application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.[9]

Although in his December 8, 1999 request for reconsideration, appellant advised that documents were being gathered to support appellant's assertion that he was earning amounts in excess of $17.67 per hour while successfully completing various management positions at various locations, no further documentation or evidence was received. Thus, appellant's December 8, 1999 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2).

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a point of law or fact not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.[10]

The April 28, 2000 and November 8, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
February 25, 2002

Alec J. Koromilas
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] 20 C.F.R. § 10.608(b) (1999).

[10] The record contains a June 27, 2000 decision, of the Office issued after appellant filed his appeal with the Board that addresses a reconsideration request. Appellant filed his appeal before the Board on June 12, 2000, as indicated by the postmark. It is well established that the Board and the Office may not have concurrent jurisdiction over the same issue in the same case and, therefore, the Office's June 27, 2000 decision is null and void. *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).