U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JONATHAN J. TYSON and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket No. 00-2305; Submitted on the Record;
Issued July 11, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 10, 2000 on the grounds that he refused on offer of suitable work.

On July 2, 1987 appellant, then a 33-year-old letter carrier, filed a traumatic injury claim alleging that he sustained a twisting injury to his right hip when he looked around at some barking dogs while delivering mail. The Office accepted that appellant sustained a right hip strain and permanent aggravation of preexisting post-traumatic degenerative arthritis of his right hip. Appellant later returned to limited-duty work for the employing establishment.

On December 8, 1997 appellant returned to full-time work as a modified rehabilitation clerk for the employing establishment. By decision dated March 3, 1998, the Office found that the position of modified rehabilitation clerk fairly and reasonably represented appellant's wage-earning capacity. This position was found to reflect a "zero" loss of wage-earning capacity. Appellant retired from the employing establishment effective August 1999 on disability retirement.

In October 1999, the employing establishment offered appellant a limited-duty position as a rehabilitation clerk. By letter dated November 5, 1999, the Office advised appellant of its determination that the rehabilitation clerk position was suitable. The Office informed appellant that he had 30 days to either accept the position or provide an explanation of his reasons for refusing it.

By letter dated December 1, 1999, appellant indicated that he was refusing the rehabilitation clerk position. He stated that "by going back in any capacity would do more harm than good to my physical condition." Appellant indicated that he had retired effective August 1999 on disability retirement and attached documentation concerning the approval of this

retirement.[1] By letter dated December 9, 1999, the Office advised appellant that his reasons for refusing the offered position were not acceptable and allowed him an additional 15 days to accept the position. Appellant again submitted a letter to the Office which indicated that he had retired on disability retirement.

By decision dated January 10, 2000, the Office terminated appellant's compensation effective that date on the grounds that he had refused on offer of suitable work. The Office indicated that the medical evidence did not support a finding that an employment-related medical condition prevented appellant from performing the rehabilitation clerk position offered by the employing establishment.

The Board finds that the Office improperly terminated appellant's compensation effective January 10, 2000 on the grounds that he refused an offer of suitable work.

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[2] 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.[3] The burden is on the Office to establish that there has been a change so as to affect the employee's capacity to earn wages in the job determined to represent his earning capacity. Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn and not on actual wages lost.[4]

In addition, Chapter 2.814.11 of the Office's procedure manual contain provisions regarding the modification of formal loss of wage-earning capacity (LWEC) decisions. The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has changed; or (3) the claimant has been vocationally rehabilitated. Office procedure further provides that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met. If the Office is seeking modification, it must establish that the original rating was in error, that the injury-related condition has improved, or that the claimant has been vocationally rehabilitated.[5]

In the present case, the Office terminated appellant's compensation effective January 10, 2000 on the grounds that he refused on offer of suitable work. Section 8106(c)(2) of the Federal Employees' Compensation Act provides in pertinent part, "A partially disabled employee who...

[1] In an earlier letter, appellant advised the Office that he would only accept the position if it were located in Dearborn, MI. The Office informed appellant that preference for another job location was not an acceptable reason for refusing a job offer.

[2] *Roy Mathew Lyon*, 27 ECAB 186, 189-90 (1975).

[3] *Elmer Strong*, 17 ECAB 226, 228 (1965).

[4] *Ronald M. Yokota*, 33 ECAB 1629, 1632 (1982).

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (June 1996).

(2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[6] Prior to terminating appellant's compensation effective January 10, 2000, the Office had issued a formal LWEC decision on March 3, 1998 in which it determined that the position of modified rehabilitation clerk fairly and reasonably represented his wage-earning capacity.[7] However, the Office did not follow its own case law and procedure regarding appellant's wage-earning capacity prior to terminating appellant's compensation. The Office did not address its prior formal LWEC decision or otherwise modify this LWEC decision which was in place at that time that it made its suitable work determination.[8]

Moreover, the Office did not act in accordance with its procedure which specifically addresses cases where a claimant stops work after reemployment. Chapter 2.814.9 of the Office's procedure manual provides in relevant part:

> 9. Claims Actions After Reemployment. Cases where a claimant stops work after reemployment may require further action, depending on whether the rating has been completed at the time the work stoppage occurs.
>
> a. Formal LWEC Decision Issued. If a formal LWEC decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In this instance the CE [claims examiner] will need to evaluate the request according to the customary criteria for modifying a formal LWEC decision (see paragraph 11 below). If the claimant retires, the CE should offer an election between FECA [Federal Employees' Compensation Act] and OPM [Office of Personnel Management] benefits if appropriate. A penalty decision under 5 U.S.C. § 8106(c) should not be issued."[9]

In the present case, the Office issued a formal LWEC decision on March 3, 1998 and appellant retired effective August 1999. Office procedure specifically provides that a decision effectuating a termination of compensation based on refusal of an offer of suitable work should not be issued in such a case.

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[6] 5 U.S.C. § 8106(c)(2).

[7] This position was found to reflect a "zero" loss of wage-earning capacity. Appellant retired from the employing establishment effective August 1999 on disability retirement. The Board notes that the above-described criteria for modifying formal LWEC decisions remain the same regardless of whether a given claimant continues to work or stops work after the issuance of a formal LWEC decision.

[8] The Board has previously addressed instances in which formal LWEC decisions remain undisturbed unless modified in accordance with the above-described criteria. In *Wallace D. Ludwick*, 38 ECAB 176 (1986), the Office issued a formal LWEC in which it determined that the employee's wage-earning capacity was represented by the position of deputy, a position which he had been performing. The Office then terminated the employee's compensation based on his refusal of a job which had been offered by the employing establishment and determined by the Office to be suitable. The Board reversed the Office's termination indicating that the LWEC decision had not been modified and that the employee's refusal of the offered position was justified by the work which had been determined to represent his wage-earning capacity.

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9a (December 1995).

For these reasons, the Office improperly terminated appellant's compensation effective January 10, 2000 on the grounds that he refused on offer of suitable work.

The decision of the Office of Workers' Compensation Programs dated January 10, 2000 is reversed.

Dated, Washington, DC
July 11, 2002

Michael J. Walsh
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member