U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LARRY M. STAFFARONI and U.S. POSTAL SERVICE,
POST OFFICE, Milwaukee, WI

Docket No. 02-1072; Submitted on the Record;
Issued August 1, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings at the time of his retirement on May 15, 2001 fairly and reasonably represented his wage-earning capacity.

On March 19, 1999 appellant, then a 48-year-old mailhandler, filed an occupational disease claim alleging that he sustained a back condition causally related to factors of his federal employment. The Office accepted appellant's claim for an acceleration of cervical spine disc disease.[1] In a decision dated October 29, 2001, the Office issued appellant a schedule award for a nine percent permanent impairment of the right upper extremity.[2] The Office authorized bilateral posterior foramenotomies at C3-4 and C4-5 on January 27, 1999 and an anterior discectomy and fusion at C6-7 on July 2, 1999.

Appellant stopped work on January 27, 1999 and returned to limited-duty employment on March 30, 1999. Appellant stopped work again on July 2, 1999. Appellant's attending physician, Dr. James R. Lloyd, a Board-certified neurosurgeon, released him to return to full-time employment on March 29, 1999 with restrictions on lifting over 10 pounds, limited twisting and bending, and no climbing or overhead work. In work status reports dated May 18, June 7 and August 23, 1999, Dr. Lloyd opined that appellant could continue working with the indicated limitations. In a work status report dated October 11, 1999, Dr. Lloyd stated that appellant should continue with his current restrictions and also found that he should sit or stand or bend as needed and should limit lifting, pushing or pulling. On February 22, 2001 Dr. Lloyd found that

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[1] The Office initially denied appellant's claim in a decision dated June 7, 1999 on the grounds that he failed to establish fact of injury. By decision dated March 8, 2000, a hearing representative reversed the Office's June 7, 1999 denial and accepted the claim for an acceleration of cervical disc disease.

[2] The issue of the whether appellant has more than a nine percent permanent impairment of the right upper extremity is not before the Board in this appeal as the schedule award issue has been remanded in accordance with a motion from the Director.

appellant was limited to lifting five pounds beginning February 20 and ending April 2, 2001. In an April 2, 2001 work status form, Dr. Lloyd found that appellant could "only walk for a maximum of [five] minutes an hour and only [two] minutes at a time." In an office visit note dated May 15, 2001, Dr. Lloyd noted that appellant's physical examination was "essentially unchanged from when I saw him last month."

Appellant retired on disability effective May 15, 2001. By letter dated October 2, 2001, the Office requested that the employing establishment provide the current salary for appellant's date-of-injury position, his current job title and employment duties and his current salary. In a response received October 5, 2001, an official with the employing establishment provided the salary for appellant's date-of-injury position and noted that appellant "was granted a disability retirement effective May 15, 2001." In a subsequent telephone call, an official with the employing establishment provided appellant's salary effective May 15, 2001.

By decision dated January 17, 2002, the Office found that appellant had no loss of wage-earning capacity based on its determination that his actual earnings at the time of his retirement fairly and reasonably represented his wage-earning capacity.

The Board finds that the Office improperly determined that appellant's actual earnings at the time of his retirement on May 15, 2001 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.[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 that a retroactive wage-earning capacity determination may be made when a claimant has worked in an alternative position for at least 60 days, the Office has determined that the employment fairly and reasonably represented the wage-earning capacity and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting his or her ability to work. The procedures further indicate that an assessment of suitability need not be made since the employee's performance of the duties is considered the best evidence of whether the job is within the employee's physical limitations.[5] The Board has concurred that the Office may perform a retroactive wage-earning capacity determination in accordance with its procedures.[6]

[3] 5 U.S.C. § 8115(a).

[4] *See Monique L. Love*, 48 ECAB 378 (1997).

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

[6] *See Tamra McCauley*, 51 ECAB 375 (2000).

As noted above, under Office procedures a retroactive wage-earning capacity determination may be performed if the employment fairly and reasonably represents wage-earning capacity. The Office's procedure manual provides that factors to be considered in determining whether the claimant's work fairly and reasonably represents his wage-earning capacity include the kind of appointment, that is, whether the position is temporary, seasonal or permanent, and the tour of duty, that is, whether it is part time or full time.[7] Further, a makeshift[8] or odd lot position designed for a claimant's particular needs will not be considered suitable.[9] In this case, the Board notes that it not clear from the record what duties appellant was performing prior to his disability retirement on May 15, 2001. The Office requested that the employing establishment provide a description of the duties that appellant was performing prior to his retirement and also his job title. The employing establishment did not provide the requested information. There is no evidence from the employing establishment describing appellant's work duties or schedule from the time he returned to limited-duty employment in 1999 through his retirement in May 2001.[10] The Board, therefore, is unable to determine whether the position was either temporary, sporadic or makeshift such that it would not fairly and reasonably represent his wage-earning capacity. The use of what may be an inappropriate position as the basis of an employee's wage-earning capacity will be more closely scrutinized where, as here, the Office applies its loss of wage-earning capacity decision prospectively, that is, to a period after the employee was no longer working in the position used as representative of his wage-earning capacity.[11] Accordingly, the Board finds that the Office failed to properly determine appellant's wage-earning capacity.

[7] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (December 1993).

[8] A makeshift position is a position that is specifically tailored to an employee's particular needs, and generally lacks a position description with specific duties, physical requirements and work schedule. *See William D. Emory*, 47 ECAB 365 (1996); *James D. Champlain*, 44 ECAB 438 (1993).

[9] *See, e.g., Michael A. Wittman*, 43 ECAB 800 (1992) (where the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the claimant only performed limited duties and did not appear every month as normally required); *Elizabeth E. Campbell*, 37 ECAB 224 (1985) (where the Board found that the evidence did not support a finding that the position of "baseball cover sorter" fairly and reasonably represented the claimant's wage-earning capacity based on the fact that the position tended to be seasonal and appeared to have been makeshift work designed for the claimant's particular needs).

[10] The record contains a temporary functional status report signed by a nurse with the employing establishment noting appellant's work restrictions from May 6 to June 4, 2000, and from September 28 to November 29, 2000.

[11] *See Albert L. Poe*, 37 ECAB 684 (1986).

The decision of the Office of Workers' Compensation Programs dated January 17, 2002 is reversed.

Dated, Washington, DC
August 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member