U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANDREW H. PRATER and DEPARTMENT OF THE NAVY, MARINE CORPS LOGISTICS BASE, Albany, GA

Docket No. 02-1918; Submitted on the Record; Issued August 7, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether appellant had any disability on or after February 8, 2002, causally related to his accepted employment lumbar strain injury.

The Office of Workers' Compensation Programs accepted that on December 6, 1999 appellant, then a 61-year-old recycling specialist, sustained lumbar strain as he attempted to lift a pallet off the deck, felt a pull in his back and tumbled over.[1] Appellant stopped work and claimed compensation beginning May 24, 2000 by Form CA-7.

On September 25, 2000 appellant's treating physician, Dr. Daniel D. Rhoads, an orthopedic surgeon, indicated that appellant could work eight hours per day with eight hours of sitting, reaching and performing repetitive movements, and with two to three hours per day of walking, standing and squatting. He indicated that appellant could push, pull and lift 2 to 3 hours per day with a limit of 5 to 10 pounds, and could kneel and climb 1 hour per day with breaks every 2 to 3 hours. Dr. Rhoads indicated that appellant had reached maximum medical improvement that date and indicated that there was nothing further medically he could offer appellant.

On January 11, 2001 appellant accepted a light-duty job offer from the employing establishment and returned to full-time light-duty work. This job required that he feed metal cans into a can crusher, sort glass and plastic bottles into drums, sort recycled paper, answer the telephone, take requests for recyclables pick-up, pull nails from boards for pallet rebuild operation, and drive a three-ton truck for recyclables pick-up, and was consistent with Dr. Rhoads' activity limitations. He returned to work 40 hours per week effective January 16, 2001 at the same wages as his previous job. Appellant's light-duty job was classified as "term" and was expected to expire in February 2002.

[1] The record supports that appellant began his federal employment as a term employee, and was a term employee at the time of his original injury.

On March 27, 2001 the Office formally determined that appellant had no loss in wage-earning capacity as he had been reemployed at his previous wage rate, and had been reemployed with the kind of appointment and tour of duty that was equivalent to that of the job he held on the date of injury, that of a term employee. Appellant's rehabilitation file was closed on March 27, 2001.

On May 2, 2001 appellant filed a Form CA-2a, claim for recurrence of disability claiming that his back hurt when he drove his truck or car and hurt when he bent or stood. Appellant evidently did not stop work.

On June 5, 2001 the Office accepted that appellant sustained a recurrence of disability commencing May 2, 2001. Appellant requested authorization of medical treatment in Piedmont, AL, where he had relatives so he would not have to drive to be treated and he submitted a Form CA-7, claim for compensation.

On February 8, 2002 when his appointment expired, appellant stopped work and claimed compensation commencing that date. The employing establishment explained that he was not terminated for cause but because his appointment term had expired.

By letter dated February 27, 2002, the Office advised appellant that his claim was being considered as a recurrence of disability. It requested that he submit medical evidence to support his inability to work. In response appellant submitted duplicates of previously submitted 2000 and 2001 medical records, the most recent of which were from Dr. Rhoads and were dated July 5 and October 4, 2001, which stated, respectively, that Dr. Rhoads was not certain why appellant made an appointment, as nothing has really changed, and that he had nothing more to offer appellant. Dr. Rhoads did note that appellant continued to complain of back pain and the inability to perform light duty, and that appellant felt it was dangerous for him to drive, but also that he continued to refuse surgery and continued to work.

By decision dated March 29, 2002, the Office rejected appellant's claim for compensation commencing February 2, 2002 finding that the medical evidence of record did not support that he was totally disabled from performing his light-duty work.

The Board finds that appellant had no disability on or after February 8, 2002, causally related to his accepted employment lumbar strain injury.

The Office procedure manual, Chapter 2.814.12(a), explains that, if a reemployed claimant faces removal from employment due to termination of his temporary employment, such occurrence is not considered to be a recurrence of disability.[2] The procedure manual notes that when a formal loss of wage-earning capacity (LWEC) has been determined, the claimant has the burden, with respect to any subsequent loss of earnings, to show that one of the accepted reasons

[2] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacitty*, Chapter 2.814.12(a) (July 1997). Chapter 2.1500.3(b)(2) regarding the definition of a recurrence of disability also provides that the definition does not include a work stoppage caused by the termination of a temporary appointment.

for modifying an LWEC applies.[3] The reasons are: the original LWEC rating was in error; the employee's medical condition has changed; or the employee has been vocationally rehabilitated, either through vocational training or self-rehabilitation, and the wage-earning capacity has increased as a result. The procedure manual notes that the status of an employee with an established wage-earning capacity who is removed because of a reduction in force or a closure, does not change with regard to receipt of the Federal Employees' Compensation Act benefits, and if a formal claim for recurrence is filed, it should be denied, unless the claimant has shown a material change in his or her medical condition as defined in Chapter 2.814.11(b)(1), which requires that the employee must establish that the injury-related condition has worsened.

In this case, the Office made a loss of wage-earning capacity determination on March 27, 2001 which formally determined that appellant had no loss in wage-earning capacity as he had been reemployed at his previous wage rate with the same kind of appointment he had held when injured.[4] None of the medical evidence submitted after that time demonstrated any change for 2002 in the nature or extent of appellant's injury-related condition. Appellant submitted duplicates of previously submitted 2000 and 2001 medical records, the most recent of which were from Dr. Rhoads and were dated July 5 and October 4, 2001, which stated, respectively, that Dr. Rhoads was not certain why appellant made an appointment, as nothing has really changed, and that he had nothing more to offer appellant. Dr. Rhoads did note that appellant continued to complain of back pain and the inability to perform light duty and that appellant felt it was dangerous for him to drive, but also that he continued to refuse surgery and continued to work.

The Board notes that this evidence does not support that appellant's injury-related lumbar strain had worsened for the purposes of modifying his loss of wage-earning capacity. As appellant's temporary employment term had expired, and as the Office had previously determined that he had no loss in wage-earning capacity, appellant has not demonstrated that he had any disability or compensation entitlement on or after February 8, 2002, causally related to his accepted employment lumbar strain injury.

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[3] In determining WEC based on actual earnings, the kind of appointment and tour of duty must be at least equivalent to those of the job held on the date of injury, and in appellant's case where he was originally a term employee, it was acceptable to use his new term light duty employment in excess of 90 days to calculate his wage-earning capacity.

[4] As this decision was made more than one year before appellant filed his appeal with the Board, the Board lacks jurisdiction to review this determination; *see* 20 C.F.R. § 501.3(d)(2).

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 29, 2002 is hereby affirmed.

Dated, Washington, DC
August 7, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member