U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT L. EDWARDS and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

Docket No. 01-1197; Submitted on the Record;
Issued May 19, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: 1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2), effective July 16, 2000, on the grounds that he refused suitable work; and (2) whether appellant established entitlement to a schedule award based on his accepted injuries.

On February 28, 1975 appellant, then a 35-year-old clerk, alleged that on that day he sustained an injury to his left knee while in the performance of duty.[1] Appellant remained at work that day but received continuation of pay from April 23 to June 6, 1975, and was placed on the periodic rolls on June 10, 1975. He returned to work in May 1982. Appellant henceforth worked intermittently in a limited-duty position and received appropriate compensation benefits.

The Office ultimately accepted a left knee strain and internal derangement injuries, a consequential right knee torn medial meniscus, left knee patellectomy, left knee arthrotomy, right knee arthroscopy and bilateral knee arthroplasty. The Office subsequently granted appellant a schedule award for 23 percent impairment of the left leg and 13 percent impairment of the right leg. The award ran from January 21, 1982 to January 16, 1984.

In a decision dated December 3, 1997, the Office determined that appellant's wage-earning capacity was represented by his actual earnings as a modified/rehabilitation distribution clerk which he began on November 25, 1996 and, therefore, reduced his compensation in accordance with 5 U.S.C. § 8115.[2]

On May 14, 1998 appellant filed a claim for a schedule award.

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[1] The Board notes that this record contains documents not associated with this claim.

[2] Appellant's restrictions were no prolonged standing more than 4 hours a day, no climbing and no lifting more than 50 pounds.

In a report dated August 31, 1998, Dr. D. Dirk Nelson, appellant's treating physician and a Board-certified orthopedic surgeon, requested authorization for total knee replacement surgery. On September 22, 1998 the Office authorized bilateral knee arthroplasty.

On October 28, 1998 appellant underwent left total knee replacement surgery.

By letter dated November 4, 1998, the Office paid appellant compensation from October 28 to November 13, 1998, and advised him to file a Form CA-8 every two weeks for further compensation.[3]

On March 7, 1999 appellant underwent right total knee replacement surgery.

In a report dated August 23, 1999, Dr. Nelson stated that appellant "can return to light-duty activities as of September 7, 1999." He noted that appellant's activities would be "primarily sitting with only light lifting. His restrictions would include prolonged walking, prolonged standing, minimal climbing. No kneeling or squatting."

In a report dated September 15, 1999, the employing establishment requested Dr. Nelson to review a modified job description for appellant which offered him an eight-hour day work schedule, with light lifting, minimal climbing, no prolonged walking or standing, and no kneeling or squatting.

In a report dated September 20, 1999, Dr. Nelson stated that appellant's subjective complaints "are far more than his objective findings and his increase in symptoms are directly related to his recent return to work date. At this point my recommendation is that we get a functional capacity evaluation and do a short course of work hardening to document whether we can make any improvement in his functional status."

In a report dated October 18, 1999, a physical therapist stated that appellant declined to participate in a work-hardening program because he was scheduled to retire on November 1, 1999.

In a report dated October 25, 1999, Dr. Nelson stated:

> "On physical examination [appellant] actually has wonderful results in both knees. There is no evidence of swelling inflammation or swelling in either knee. The tissues are soft. He has good stability in both knees. In the left knee he has full extension and flexion to 100 degrees. In the right he has full extension and flexion to 115 degrees. At this point, it is my opinion that he has made a successful recovery from surgical reconstruction. It is also my opinion that his suggestive complaints outweigh any physical findings on physical examination. At this point it is my opinion that [appellant] is capable of performing at a light-duty status as outlined in [the employing establishment's] letter of September 15,

[3] The record reflects that appellant claimed compensation pursuant to CA-8 forms (claim for continuing compensation on account of disability) for certain periods and was paid total disability compensation payments from October 28, 1998 to April 24, 1999, and from July 18 to August 14, 1999.

[1999]. He outlines a job where the activities are primarily sitting and with some light lifting. There is no prolonged walking, no prolonged standing, minimal climbing, no kneeling or squatting. It is my feeling that [appellant] could perform at that level at this time."

In a letter dated November 12, 1999, appellant notified the Office that he had retired effective November 1, 1999. The employing establishment sent the Office a notice that appellant elected optional retirement effective November 1, 1999.

On December 2, 1999, the employing establishment notified the Office that appellant had retired effective November 1, 1999 and that he has "no desire to return to the work assignment his doctor seemed suitable." The employing establishment asked that appellant's compensation be immediately terminated.

In a report dated December 30, 1999, the Office noted that it would pay appellant total disability compensation from January 2 to January 29, 2000.

On February 3, 2000, the employing establishment offered appellant the position of modified/rehabilitation distribution clerk beginning on February 12, 2000. The physical restrictions included sitting for eight hours, light lifting, and no walking, climbing, squatting, kneeling or standing.

By letter dated February 9, 2000, the Office advised appellant that he had 30 days to accept the offered position. Appellant did not respond.

In a decision dated July 13, 2000, the Office terminated appellant's compensation effective July 16, 2000, and denied his claim for a schedule award on the grounds that he declined a suitable job.

By letter dated July 20, 2000, appellant notified the Office that he had retired in November 1999 and that he could not accept the February 2000 job offer.

By letter dated October 18, 2000, appellant inquired about his schedule award. He noted that he had started receiving his retirement annuity. By letter dated December 3, 2000, appellant requested that his case "be reconsidered for a schedule award." In a decision dated December 22, 2000, the Office denied review of its July 13, 2000 decision. By letter dated February 26, 2001, appellant asked for assistance with his schedule award claim. By letter dated February 9, 2001, the Office referred appellant to its December 22, 2000 decision.

The Board finds that the Office improperly terminated appellant's compensation 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.[4] A modification of such determination is not warranted unless there is a material change in the nature and extent of the

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

injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.[5] 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.[6]

In addition, Chapter 2.814.11 of the Office's procedure manual contains 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.[7]

In the present case, the Office terminated appellant's compensation on July 13, 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 ... (2) refuses or neglects to work after suitable work is offered ... is not entitled to compensation."[8] Prior to terminating appellant's compensation on July 13, 2000, the Office had issued a formal LWEC decision on December 3, 1997 in which it determined that the position of modified rehabilitation clerk fairly and reasonably represented his wage-earning capacity.[9] 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.[10]

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

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

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.11 (July 1997).

[8] 5 U.S.C. § 8106(c)(2).

[9] This position was found to reflect a "zero" loss of wage-earning capacity. Appellant retired from the employing establishment effective October 2000. 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.

[10] 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.

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."[11]

In the present case, the Office issued a formal LWEC decision on December 3, 1997 and appellant retired effective October 2000. 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.

For these reasons, the Office improperly terminated appellant's compensation effective July 16, 2000 on the grounds that he refused on offer of suitable work, and therefore the July 13, 2000 decision with respect to the Office's decision to terminate compensation is revered.

With respect to appellant's October 28, 1998 claim for schedule award, the Office denied appellant's claim in its July 13, 2000 decision on the grounds that he refused suitable work. In light of the Board's decision to reverse the Office's decision to terminate appellant's compensation on July 13, 2000, its denial of appellant's claim for a schedule award is set aside and the case remanded to the Office to determine appellant's entitlement to a schedule award.

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

The decision of the Office of Workers' Compensation Programs dated July 13, 2000 is reversed, in part, set aside in part and the case remanded for further proceedings consistent with the above opinion.[12]

Dated, Washington, DC
May 19, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[12] The Board's opinion renders moot the Office's December 22, 2000 decision not to review the merits of appellant's claim.