United States Department of Labor
Employees' Compensation Appeals Board

M.W., Appellant	)	
and	)	**Docket No. 07-2083**
	)	**Issued: May 1, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Sterling Heights, MI, Employer	)	

Appearances:
Glenn L. Smith, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On August 9, 2007 appellant, through his attorney, filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's May 9, 2007 merit decision finding that he had received compensation at the correct rate of pay and had not established entitlement to more than two hours of disability compensation for the period March 26, 2004 through January 3, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has established that he was disabled for more than 2 hours per day or 10 hours a week from March 26, 2004 through January 3, 2005; and (2) whether the Office properly determined appellant's rate of pay for compensation purposes.

FACTUAL HISTORY

On September 10, 2003 appellant, then a 51-year-old part-time flexible letter carrier, developed a herniated disc due to his federal job duties. On November 17, 2003 the Office

accepted his claim for aggravation of degenerative disc disease at T7-8 and subluxation of the spine at L6-7 and T1-4.

Appellant filed a claim for compensation on March 31, 2004 and requested intermittent periods of wage-loss compensation from March 20, 2002 to March 31, 2004. The employing establishment stated that appellant worked 40 hours a week prior to March 2002. Appellant was a full-time carrier until August 15, 1998 and worked as a delivery supervisor beginning August 15, 1998. He returned to duty as a part-time flexible carrier on January 26, 2002. In a letter dated May 11, 2004, the Office informed the employing establishment that, since appellant was not a part-time letter carrier for substantially a whole year prior to March 16, 2002, the employing establishment must provide information regarding a similar employee who did work substantially the whole preceding year in such a position at a similar grade and step in a similar area. The Office stated, "If more than one such similar employee is available, submit the one with the greater number of hours." The Office requested the similar employee's gross earnings and the total number of hours worked. The employing establishment responded, noting that a similar employee earned $35,988.37 per year and worked 39.52 hours per week. On May 19, 2004 the Office paid appellant compensation for two hours per day from March 16, 2002 through April 19, 2003. The Office based appellant's pay rate on the earnings of a similar employee, part-time flexible carrier, working 40 hours per week. By decision of the same date, the Office denied appellant's claim for any additional period of intermittent disability from March 6, 2002 through April 30, 2004. Appellant requested an oral hearing on June 4, 2004. He testified at his oral hearing that he worked six hours a day, four days a week. Appellant alleged that the employing establishment failed to provide him with appropriate light-duty work from August 30 to October 24, 2003.

By decision dated August 23, 2005, the hearing representative remanded the case for further development regarding the periods of intermittent disability.

In a memorandum to file dated October 31, 2005, the Office found that appellant could work six hours a day from March 4 to April 23, 2002, that he could work four hours per day from April 24 through August 29, 2002 and, from October 29, 2002 to April 19, 2003, he could work six hours a day. The Office stated that for the period March 16, 2002 to April 19, 2003 appellant was entitled to receive $7,124.62, that he had previously been paid $5,956.21[1] and that he was due an additional $1,168.41. The Office made this payment on October 31, 2005.[2]

In a letter dated January 19, 2006, appellant requested additional compensation benefits for intermittent periods of disability from April 20, 2003 through December 31, 2004. Appellant's attending physician, Dr. John A. Wood, a chiropractor, x-rayed appellant's spine and found a misalignment of C6-7, T1-2 and T3-4 vertebra on October 7, 2003. He diagnosed subluxation of the cervical and thoracic spine with associated pain and muscle spasm. Dr. Wood submitted a series of notes varying appellant's work restrictions. On March 1, 2003 he indicated that appellant could work five days a week, six hours a day. In a note dated April 21, 2003, Dr. Wood indicated that appellant could work eight hours a day. On June 18, 2003 he indicated

[1] Appellant's weekly pay rate was calculated as $692.08 per week.

[2] The Office began payment from January 3 through November 25, 2005 and November 26 to December 9, 2005.

that appellant could work five days a week, eight hours a day. In a note dated November 26, 2003, Dr. Wood stated that appellant could work five days a week, eight hours a day. On December 11, 2003 he increased appellant's restrictions to working four days a week eight hours a day. Dr. Wood indicated that appellant could work four days a week six hours a day on March 26, 2004. In a note dated May 24, 2004, he indicated that appellant could work four days a week six hours a day.

The Office referred appellant for a second opinion evaluation with Dr. Charles Xeller, a Board-certified orthopedic surgeon, who reported on June 11, 2004 that appellant could work eight hours a day with restrictions. Dr. Xeller diagnosed cervical and thoracic degenerative joint and disc disease. On July 1, 2004 he diagnosed temporary aggravation of degenerative disc disease at T7-8 caused by appellant's work. Dr. Xeller found no cervical subluxation.

On July 26, 2004 Dr. Wood completed a form report and indicated that appellant could work four days a week six hours per day. He submitted a note on December 8, 2004 and indicated that appellant could work four days a week six hours a day. Dr. Wood responded to questions from appellant's attorney via telephone on January 14, 2005 and stated that he altered appellant's restrictions in an attempt to determine appropriate restrictions for appellant. On February 17, 2005 he noted the dates upon which he had altered appellant's restrictions. Dr. Wood stated, "I adjusted the restrictions as indicated … based on my examination of [appellant] and our conversation and the history he related of the success of the prior restrictions in alleviating his symptoms. In the case of each change, I attempted to find a level of work activity which would work for him and enable him to do his job without aggravation."

The Office referred appellant for a second opinion evaluation with Dr. Bruce D. Abrams, a Board-certified orthopedic surgeon. On August 8, 2005 Dr. Abrams found that appellant did not have subluxations of the spine. He diagnosed cervical and thoracic spondylosis and opined that appellant could work eight hours a day with no restrictions.

In a report dated October 19, 2005, Dr. Wood addressed the medical necessity for appellant's increased restrictions beginning March 26, 2004. He stated, "Due to the instability and degenerative changes that are going on in [appellant's] cervical and thoracic spine and the resulting fatiguing, pain and numbness in his left arm and hand, I have found it necessary to restrict his work schedule." Dr. Wood stated that appellant was most successful if he worked only six hours a day, four days a week. He stated that working six hours a day still caused relapses of his condition and that it was medically necessary to give appellant three days off a week to allow him to recover. In support of his opinion, Dr. Wood noted that appellant's x-rays on September 2, 2003 and March 30, 2005 showed that his spine conditions were progressively worsening.

Appellant alleged that his hourly pay rate at the time of disability on March 28, 2002 was $21.33. He submitted a listing of his hourly pay rates which indicated on November 16, 2002 he was earning $22.02 per hour. On January 17, 2006 appellant requested a final decision regarding his pay rate. The Office referred him for an impartial medical examination with Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, who examined him on March 3, 2006 and diagnosed diffuse idiopathic skeletal hyperostosis. Dr. Obianwu noted that Dr. Wood's diagnoses of subluxation were chiropractic definitions and that there were no findings on x-ray

substantiating an orthopedic subluxation of the spine. He opined that any aggravation of degenerative disc disease had subsided. Dr. Obianwu submitted a supplemental report on June 20, 2006 and opined that appellant had no disability resulting from the accepted conditions.

On March 17, 2006 the Office advised appellant of how it calculated his pay rate. Appellant disagreed, contending that he was a 24-year employee and it was not appropriate to base his compensation on the pay rate of a newly hired part-time flexible carrier.

In a letter dated June 19, 2006, appellant informed the Office that he was no longer seeking compensation for the period August 23 through October 17, 2003.

By decision dated August 3, 2006, the Office found that appellant was not entitled to compensation from April 20 through August 22, 2003 and from October 18, 2003 through January 2, 2005. The Office found that Dr. Wood failed to provide medical reasoning explaining why appellant's work hours were decreased following his return to full-time work on April 20, 2003.

Appellant requested an oral hearing on August 23, 2006. He submitted additional documentation supporting that his hourly pay rate was $21.70 beginning January 26, 2002.

The Office issued a notice of proposed termination of compensation on February 7, 2007.

Appellant testified at an oral hearing on February 22, 2007.

By decision dated May 9, 2007, the hearing representative noted that appellant felt that he was entitled to compensation for 1936.40 hours and that he was paid at the wrong pay rate of $692.08 per week when his actual pay rate was $22.02 per hour or $880.80 per week. He found that appellant failed to submit medical evidence to establish disability for the period April 20 through August 22, 2003 and October 17, 2003 through March 25, 2004. However, the hearing representative found that Dr. Wood's October 19, 2005 report established that appellant was entitled to disability for two hours a day from March 26, 2004 through January 3, 2005. He found that appellant was paid at the correct pay rate.

By decision dated May 14, 2007, the Office terminated appellant's compensation benefits effective that date.[3]

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,[4] the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[5] Disability is thus not synonymous with physical impairment, which may

[3] In the request for review by the Board, appellant and his attorney specifically requested that the Board review only the May 9, 2007 hearing representative's decision addressing appellant's claim for partial disability and his pay rate. Therefore, the Board will only address these issues on appeal.

[4] 5 U.S.C. §§ 8101-8193.

[5] 20 C.F.R. § 10.5(f).

or may not result in incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in the Act.[6] Appellant for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be provide by preponderance of the reliable probative and substantial medical evidence.[7]

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[8]

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for aggravation of degenerative disc disease at T7-8 and subluxations of the spine at L6-7 and T1-4. Appellant filed claims for compensation requesting wage-loss compensation for intermittent periods of disability. By decision dated August 6, 2006, the Office denied appellant's claim for compensation from April 20 through August 22, 2003 and from October 18, 2003 through January 2, 2005. The hearing representative found on May 9, 2007 that the medical evidence supported that appellant was able to work six hours a day, five days a week from March 26, 2004 through January 3, 2005. She found that appellant was entitled to compensation for 10 hours a week.

In support of his claim for disability beginning April 20, 2003, appellant submitted a report from Dr. Wood, his attending physician and chiropractor, who stated that appellant could work eight hours a day.[9] Dr. Wood supported that appellant was capable of working full time on June 18 and November 26, 2003. Beginning on December 11, 2003 he found that appellant should work only four days a week. Dr. Wood did not offer any medical reasons or findings from examination to support appellant's disability. Without medical findings and an explanation of how appellant's condition had changed resulting in the need for additional work restrictions,

[6] *Cheryl L. Decavitch*, 50 ECAB 397, 401 (1999).

[7] *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

[8] *Id.*

[9] Section 8101(2) of the Act provides that the term "`physician' … includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist." 5 U.S.C. § 8101(2). As noted previously, Dr. Wood x-rayed appellant's spine on October 7, 2003 and diagnosed subluxations of the spine at C6-7, T1-2 and T3-4. He is, therefore, a physician for the purposes of the Act.

Dr. Wood's report is not sufficient to establish that appellant was partially disabled due to his accepted employment injuries on December 11, 2003.[10]

Dr. Wood changed appellant's work restrictions on March 26, 2004. He indicated that appellant should begin to work four days a week six hours a day. Dr. Wood repeated these restrictions on December 8, 2004. On January 14, 2005 he adjusted appellant's work restrictions based on conversations with appellant. As noted above, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[11] Dr. Wood did not provide any objective signs of disability and stated that he based his work restrictions on appellant's statements regarding his ability to work. Without the necessary physical findings and medical reasoning, this report is not sufficient to meet appellant's burden of proof in establishing that he was disabled due to his accepted employment injuries.

Dr. Wood addressed his change in work restrictions beginning March 26, 2004 on October 19, 2005. He stated that appellant experienced continuing degenerative changes in his cervical and thoracic spine which resulted in pain, fatigue and numbness in the left arm and hand. Dr. Wood noted that appellant's March 30, 2005 x-rays demonstrated a progressive worsening from the September 2, 2003 x-rays. While he supported that appellant's spine continued to degenerate as demonstrated on x-ray, he failed to provide any medical reasoning explaining why he believed that this change in the nature and extent of appellant's diagnosed condition was due to his accepted employment-related condition. Without medical reasoning explaining why the accepted employment-related aggravation of degenerative disc disease caused appellant's condition to worsen, rather than the normal processes of appellant's underlying degenerative disc disease, this report is not sufficient to meet appellant's burden of proof. The medical evidence does not support that appellant had more than 10 hours of disability per week due to his accepted employment injury as awarded by the hearing representative.

LEGAL PRECEDENT -- ISSUE 2

Section 8114(d) of the Act provides four different methods for determining the average annual earnings depending on the character and duration of the employment:

> "(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay --
>
> (A) was fixed, the average annual earnings are the annual rate of pay; or
>
> (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for the particular employment or the average

[10] *Kharabi*, *supra* note 7.

[11] *Id.*

thereof, if the daily wage has fluctuated by 300, if he was employed on the basis of a 6-day workweek 280, if employed on the basis of a 5 1/2-day week and 260, if employed on the basis of a 5-day week.

"(2) If the employee did not work in employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury, but the position was one which would have afforded employment for substantially a whole year, the average annual earnings are a sum equal to the average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States, in the same or neighboring place, as determined under paragraph (1) of this subsection.

"(3) If either of the foregoing methods of determining the average annual earnings cannot be applied reasonably and fairly, the average annual earnings are a sum that reasonably represents the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury having regard to the previous earnings of the employee in federal employment and of other employees of the United States in the same or most similar class working in the same or most similar employment in the same or neighboring location, other previous employment of the employee or other relevant factors. However, the average annual earnings may not be less than 150 times the average daily wage the employee earned in the employment during the days employed within one year immediately preceding his injury."[12]

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of his monthly pay, which is known as his basic compensation for total disability."[13] Under 5 U.S.C. § 8101(4), "monthly pay" means the monthly pay at the time of injury, or the monthly pay at the time disability begins or the monthly pay at the time compensable disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United States, whichever is greater.

ANALYSIS -- ISSUE 2

Appellant worked at the employing establishment as a delivery supervisor from August 15, 1998 through January 25, 2002 and began working as a part-time flexible carrier on January 26, 2002. He noted that he had worked at the employing establishment for 24 years. Appellant submitted evidence that beginning January 26, 2002 he was earning $21.70 per hour. On November 16, 2002 he was earning $22.02 per hour.

[12] 5 U.S.C. § 8114(d).

[13] 5 U.S.C. § 8105(a). Section 8110(b) of the Act provides that total disability compensation will equal three fourths of an employee's monthly pay when the employee has one or more dependents. 5 U.S.C. § 8110(b).

The Office properly found that appellant had not worked in the position of part-time flexible carrier for substantially the whole year prior to the beginning of his disability in March 2002, and that the record suggests that the position was one which would have afforded employment for substantially a whole year. Appellant's average annual earnings are, therefore, equal to the average annual earnings of an employee of the same class working substantially the whole the preceding year in the same employment. The Office properly requested that the employing establishment provide the information regarding a similar employee who did work substantially the whole preceding year as a part-time flexible carrier at a similar grade and step in the same area as appellant. The Office also requested that the employing establishment provide the pay rate of the similar employee with the most hours. The employing establishment provided information regarding a part-time flexible carrier who worked essentially 40 hours a week and earned $35,988.37 per year. The Office calculated that this weekly pay rate was $692.08 per week.

Appellant alleges that his pay rate for compensation purposes should be $22.02 per hour based on his recurrence of disability in March 2003 or $880.80 per week rather than $692.08 per week as calculated by the Office. He has provided documentation that he was in fact earning more than $17.32 per hour as provided by the employing establishment as the earnings of a similar employee.

The Board finds that this case is not in posture for decision on the issue of whether the Office properly determined appellant's pay rate. Appellant is entitled to have his rate of pay for compensation purposes based on "average annual earnings of an employee of the same class working substantially the whole immediately preceding year in the same or similar employment by the United States, in the same or neighboring place."[14] The Office's procedure manual provides that the employee selected should be of the same grade and step as the injured employee.[15] The Board is unable to ascertain from the record appellant's grade and step at the time of his disability in March 2002 when he was earning $21.07 per hour. It is unclear from the documentation submitted by the employing establishment whether the employee selected was of the same grade and step as appellant, whether there was only one similar employee or whether the employing establishment selected a similar employee with the highest number of hours. The employing establishment did not provide the grade and step of the selected employee and did not otherwise explain how this employee was similar to the employee. The Office should request additional information from the employing establishment regarding the employee selected as appellant has provided information supporting that he is entitled to a greater pay rate than the selected individual based on time in service or higher grade and step. In interpreting the statute for pay rate purposes, the Board has long recognized that the objective is to arrive at as fair an estimate as possible of the claimant's future earning capacity.[16] The case will be remanded for development of the evidence to ensure a fair estimate of appellant's rate of pay.

[14] 5 U.S.C. § 8114(b)(2).

[15] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.4.b (December 1995).

[16] *Leonard D. Canfield* (Docket No. 04-2017, issued February 1, 2005).

CONCLUSION

The Board finds that the medical evidence does not establish that appellant is entitled to additional compensation for disability due to his accepted employment injuries. The Board further finds that the case is not in posture for decision regarding appellant's rate of pay for compensation purposes. On remand, the Office should request additional information from the employing establishment and ascertain that the selected similar employee was in fact similar to appellant in grade, step and pay.

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed, in part, and set aside, in part, for further development consistent with this decision of the Board.

Issued: May 1, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board