

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RAMON PAYAN-GONZALEZ and DEPARTMENT OF THE AIR FORCE,
AIR FORCE SYSTEMS COMMAND, KIRTLAND AIR FORCE BASE, N.M.

*Docket No. 96-1304; Submitted on the Record;
Issued June 9, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that the position of cleaner housekeeper fairly and reasonably represented appellant's wage-earning capacity effective March 3, 1996.

On May 6, 1993 appellant, a grounds keeper, was struck from behind while riding in an employing establishment truck. He was diagnosed as sustaining a posteriorly displaced cervical spine odontoid fracture.¹ On June 22, 1993 the Office accepted that appellant sustained a subluxation of C1-2, instability of C1-2 and "fractured odontoid," for which he underwent neurosurgical stabilization and fixation on May 10, 1993. Appellant was released to return to light duty on November 1, 1993. A functional capacity evaluation was performed on January 11, 1994 which determined that appellant could perform light duty. Specifically it was determined that appellant could lift 25 pounds from floor level frequently and lift 16 pounds overhead frequently; that he could carry 20 pounds 100 feet occasionally and 13 pounds frequently; that he had normal tolerance to prolonged sitting, standing and walking; normal tolerance to repeated stair climbing, ladder climbing, overhead reaching, crawling, squatting and stooping; but restricted tolerance to occasional kneeling and crouching. The physician found that activities which required extreme range of neck motion might be difficult.

On July 21, 1994 the employing establishment terminated appellant's employment finding that he was medically unable to perform the essential duties of his position as a laborer, and that there was no other position available for which he qualified.

On February 16, 1995 appellant was involved in a motor vehicle accident in which he was injured and three people were killed. Appellant sustained a pneumomediastinum, facial lacerations, a mucosal tear of the left piriform sinus with extensive posterior glottic edema, a left wrist wound and a right tibial fracture. On April 8, 1995 appellant's treating University of New

¹ A tooth-like fracture; *see* Dorland's Illustrated Medical Dictionary, 27th Edition, p.1167.

Mexico physicians noted that his right tibial fracture was healing, that he was instructed to increase right lower extremity weight bearing, and that he should wean himself from using his crutches. No activity restrictions were noted.

In response to the Office's request for reevaluation of appellant's condition, appellant's treating physician, Dr. Emmet Thorpe, an occupational medicine specialist, noted in a report dated May 19, 1995 that appellant had continued neck discomfort with limitation of motion associated with the C1-2 cervical fusion, that a motor vehicle accident on February 16, 1995 resulted in trachial injury and probable exacerbation of his neck condition as well as a fractured right tibia and a low back injury and that appellant had depression which was being treated with Zoloft. Dr. Thorpe answered the Office's questions, noting that appellant continued to have the same amount of limitation of movement that had been present in the past with pain somewhat greater than it was. He noted that the effects of appellant's work injury persisted and that the functional capacity evaluation limitations imposed on January 11, 1994 were still valid. Appellant was prevented from returning to the job he held at the time of the work injury and temporarily unable to do anything more than sedentary work. Dr. Thorpe concluded that he did not expect appellant to ever be able to fully recover, as no treatment would allow this to occur.

The Office referred appellant for vocational rehabilitation and several position descriptions were forwarded to Dr. Thorpe for his opinion on their suitability for appellant's residual condition. On July 26, 1995 Dr. Thorpe indicated that appellant's 1994 functional capacity evaluation limitations were still valid, but did not comment further on any specific position.

On June 13, 1995 appellant advised his counselor that he was electing to switch over to the Office of Personnel Management (OPM) benefits in lieu of benefits under the Federal Employees' Compensation Act.

On October 30, 1995 Dr. Thorpe completed a return to work form indicating that appellant could return to work that date within the functional capacity evaluation limitations specified on January 11, 1994. Dr. Thorpe recommended that appellant keep physically active by walking every day and by doing range of motion exercises to keep his neck as limber as possible.

On December 1, 1995 the rehabilitation counselor closed appellant's case as appellant had not followed through on many of the job leads he had been given and had not been active in the job search process. The rehabilitation counselor opined that it was doubtful appellant would continue efforts to look for work as he seemed more interested in obtaining disability retirement.

On December 5, 1995 appellant was found guilty of three counts of vehicular homicide, one count of great bodily injury by vehicle, one count of reckless driving, and one count of aggravated driving while intoxicated, all third degree felonies stemming from the February 16, 1995 motor vehicle accident. At some point thereafter he was incarcerated.

On December 19, 1995 appellant's wife requested an election form to send to OPM as appellant wanted to reelect benefits under Federal Employees Retirement Service. On

January 10, 1996 appellant completed the Form CA1105-0989 and elected civil service retirement system (CSRS) benefits effective that date.

The records indicates appellant was incarcerated at some point prior to January 11, 1996 in pre-sentence confinement. He was sentenced on March 1, 1996 to 13 years and 89 days in prison with 3 years and 89 days suspended and credit for 48 days pre-sentence confinement.

On February 6, 1996 the Office issued appellant a notice of proposed reduction of compensation finding that he was no longer totally disabled and that he had the capacity to earn wages as a cleaner housekeeper. In an accompanying memorandum, the Office stated that Dr. Thorpe had concurred with functional capacity evaluation limitations in 1994 and that the rehabilitation counselor had advised on January 12, 1996 that appellant was “qualified for and could perform the position of Cleaner, Housekeeper,” according to the description as detailed in the Dictionary of Occupational Titles. The position was described as follows: “Cleans rooms and halls in commercial establishments. Sorts, counts, folds, marks and carries linens. Replenishes supplies, makes beds.” The Office found that appellant had the ability to earn \$220.00 per week as a cleaner, housekeeper and proposed a reduction in his gross amount of compensation by that amount. The Office gave appellant 30 days within which to submit evidence or argument if he disagreed with the proposed reduction.

On February 15, 1996 appellant again completed an election form indicating that effective February 1, 1996 he was electing to received CSRS benefits in lieu of Act benefits.

On March 6, 1996 appellant, through his representative, objected to the Office’s proposed reduction of compensation, arguing that Dr. Thorpe’s comments on May 19, 1995 that anything more than sedentary work would have to be approved by appellant’s University of New Mexico treating physicians because of residuals of the February 1995 automobile accident, superseded Dr. Thorpe’s July 26, 1995 statement that appellant could work within the 1994 functional capacity evaluation restrictions. The Board notes that the medical evidence of record supports that appellant was last seen by his University of New Mexico treating physicians on June 28, 1995 at which time no residuals from or activity limitations related to the February 1995 automobile accident were noted. The Board further notes that appellant’s representative did not address Dr. Thorpe’s October 30, 1995 approval for appellant to return to work under the 1994 functional capacity limitations, or Dr. Thorpe’s recommendation at that time that appellant keep physically active by walking daily and by performing range of motion exercises.

On March 14, 1996 the Office finalized its wage-earning capacity determination finding that appellant’s compensation would be reduced effective March 3, 1996 based on his ability to perform the position of cleaner, housekeeper.² The Office considered appellant’s representative’s argument regarding possible activity restrictions due to appellant’s February 1995 automobile accident and noted that, in accordance with the Act Procedure Manual, Chapter

² However, on April 10, 1996 the Office advised appellant that his entitlement to compensation benefits had been suspended effective March 1, 1996, the date of his sentencing, based upon his conviction of multiple felonies. The Office explained that 5 U.S.C. § 8148 provided for suspension of benefits payable to beneficiaries imprisoned as a result of a felony conviction, and was applicable in this case.

2.814, paragraph 8(d), which addresses the evaluation of the medical suitability of a constructed position upon which a wage-earning capacity determination can be made, medical conditions arising subsequent to the work-related injury will not be considered. Therefore, the Office noted that, as the medical evidence of record supported that appellant could perform the duties of cleaner, housekeeper prior to his nonwork-related February 1995 automobile injuries, the position of cleaner, housekeeper was suitable, both medically and vocationally, to appellant's partially disabled condition and reflected his wage-earning capacity.

The Board finds that the Office of Workers' Compensation Programs properly determined that the position of cleaner housekeeper fairly and reasonably represented appellant's wage-earning capacity effective March 3, 1996 and reduced his compensation accordingly.

Regulations construing the Federal Employees Compensation Act provide that an injured employee who is unable to return to the position held at the time of injury, or to earn equivalent wages, but who is not totally disabled for all gainful employment is entitled to compensation based on loss of wage-earning capacity as provided under 5 U.S.C. § 8115.³ If an employee has no actual earnings, his wage earning capacity as appears reasonable under the circumstances is determined with due regard to the nature of the injury; the degree of physical impairment; his usual employment; his age; qualifications for other employment; the availability of suitable employment; and other factors or circumstances which may affect wage-earning capacity in his disabled condition.⁴ Compensation for loss of wage-earning capacity is based upon loss of the capacity to earn wages and not on actual wages lost.⁵ Further, a condition which develops following an employment injury and which is not a consequence of the employment injury is not to be considered in determining wage-earning capacity.⁶

Upon determining that appellant was not cooperating fully with vocational rehabilitation efforts his case was properly closed by the rehabilitation counselor, and a report with the relevant information was submitted to the Office. Thereafter the Office properly selected the position of cleaner, housekeeper from the *Dictionary of Occupational Titles* and found that appellant possessed the necessary education and experience, and that the duties were within his medical restrictions as outlined in his functional capacity evaluation, which the most recent medical evidence of record from Dr. Thorpe, appellant's treating physician, supported was still valid and applicable to appellant's partially disabled condition. The Office further determined that such positions were reasonably available within appellant's commuting area. Thereafter, the Office properly issued appellant a proposed notice of reduction of compensation on the basis that he was capable of performing the position of cleaner, housekeeper, and gave him 30 days within which to provide evidence or argument to the contrary. In response appellant's representative argued that appellant's subsequently sustained injuries and possible residuals precluded his performance of such a position. The Office, however, noted that its Procedure Manual precludes

³ *Rudolph J. Short*, 46 ECAB 437 (1995); *Paul D. Farnsley*, 46 ECAB 341 (1994).

⁴ *Alfred R. Hafer*, 46 ECAB 553 (1995).

⁵ *Billy R. Beasley*, 45 ECAB 244 (1993)

⁶ *See supra*, note 4.

consideration of subsequently sustained conditions in making a loss of wage-earning capacity determination based upon a constructed position. No probative evidence was submitted by appellant which demonstrated that the selected position was unsuitable to his partially disabled condition. Thereafter, the Office properly finalized its loss of wage-earning capacity determination, finding that appellant was capable of performing the position of cleaner, housekeeper.

Accordingly, the decision of the Office of Workers' Compensation Programs dated March 14, 1996 is hereby affirmed.

Dated, Washington, D.C.

June 9, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member