U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL I. COSTANZO and DEPARTMENT OF THE NAVY, NAVAL SEA SYSTEMS COMMAND, NAVAL SHIPYARD PHILADELPHIA, Philadelphia, PA

Docket No. 98-1156; Submitted on the Record;
Issued March 27, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of a paralegal.

The Office accepted appellant's claim for a lumbosacral sprain resulting in disc herniation at L4-5 and L5-S1 and surgery consisting of decompressive lumbar laminectomy on July 20, 1995.

In a medical report form dated October 17, 1993, Dr. John J. McPhilemy, an osteopath and appellant's treating physician, diagnosed a herniated nucleus pulposus at L4-5 and a bulging disc at L5-S1, and stated that appellant had mildly restricted range of motion and required minor modification in lifting and bending.

In a work restriction evaluation, Form OWCP-5, dated October 25, 1993, Dr. McPhilemy indicated that appellant could work 8 hours a day, with intermittent sitting, walking, standing, bending and squatting, and no lifting of more than 20 pounds.

In a report dated December 4, 1993, the rehabilitation specialist stated that appellant reviewed the specific physical limitations and agreed with Dr. McPhilemy's evaluation of his physical capabilities.

In a work restriction evaluation form dated December 11, 1995, Dr. McPhilemy indicated that appellant could intermittently sit, walk and stand and intermittently lift 1 hour from 10 to 20 pounds. He indicated that appellant was restricted to limited bending, squatting and kneeling.

In a vocational report dated June 26, 1997, the rehabilitation specialist opined that appellant could perform the position of a paralegal. The position was light duty, with lifting requirements of up to 20 pounds, was reasonably available and was within appellant's qualifications as appellant had obtained an associate degree in paralegal studies. In a report dated September 16, 1996, Dr. McPhilemy noted that appellant was involved in a paralegal

training program and stated that appellant had been allowed to return to light-duty work for the past years and he had encouraged appellant to perform modified work since October 7, 1991.

By letter dated June 20, 1997, appellant's attorney stated that appellant "in good faith" was unable to perform the position of a paralegal based on the opinion of Dr. Geoffrey Temple, an osteopath, dated June 9, 1997. In his June 9, 1997 report, Dr. Temple stated that appellant had sustained a "huge" herniated disc at L5-S1 as a result of a motor vehicle accident on April 20, 1997. He stated that appellant was disabled from his potential occupation as a paralegal and surgery was anticipated "soon." In a progress note dated June 2, 1997 from Dr. McPhilemy, which was submitted on June 30, 1997, Dr. McPhilemy stated that appellant related the onset of symptoms following a motor vehicle accident on April 20, 1997 and prior to the accident, he was asymptomatic. He stated that appellant had a large disc herniation which "almost certainly" would have to be removed by surgery.

In a notice of proposed decision dated October 8, 1997, the Office informed appellant that it proposed to reduce his compensation based on its findings that appellant had the wage-earning capacity to perform the position of a paralegal at the rate of $450.00 a week. The Office provided appellant with 30 days to respond.

By letter dated November 4, 1997, appellant's attorney agreed that the position of paralegal was "medically and vocationally suitable for [appellant] prior to" the motor vehicle accident on April 20, 1997. The attorney stated that since that accident, appellant was no longer physically capable of performing the position of paralegal as stated in Dr. Temple's June 9, 1997 report.

By decision dated December 4, 1997, the Office finalized the proposed notice of reduction, finding that the position of paralegal reflected appellant's wage-earning capacity.

The Board finds that the Office properly adjusted appellant's compensation to reflect his wage-earning capacity in the position of a paralegal.

Once the wage-earning capacity of an injured employee is properly determined, it remains undisturbed regardless of actual earnings or lack of earnings.[1] A modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.[2] The burden of proof is on the party attempting to show a modification of the wage-earning capacity award.[3]

In the present case, in his November 4, 1997 letter, appellant's attorney agreed that the position of paralegal was medically and professionally suitable for appellant but as of April 20, 1997, when the nonwork-related April 20, 1997 motor vehicle accident occurred, appellant's

[1] *See Lawrence M. Nelson*, 39 ECAB 788 (1988).

[2] *See Dana Bruce*, 44 ECAB 132, 142-43 (1992).

[3] *See Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

back condition worsened as explained in Dr. Temple's June 9, 1997 report, and appellant was no longer able to perform the position of a paralegal. The Board finds, however, that Dr. Temple's June 9, 1997 report establishing that appellant is totally disabled due to the April 20 , 1997 motor vehicle accident is not sufficient for appellant to meet his burden of proof to establish entitlement to additional compensation from the Office for total disability. Appellant must show that his enlarged herniated disc at L4-5 and L5-S1 constituted a natural consequence arising from factors of his former federal employment.[4]

It is an accepted principle of workers' compensation law, and the Board has so recognized, that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause.[5] As is noted by Professor Larson in his treatise: "[O]nce the work-connected character of any injury, such as a back injury, has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause."[6]

Dr. Temple's June 6, 1997 report did not relate appellant's current back condition to the August 13, 1986 employment injury. Rather, he indicated that it was due to a nonwork-related car accident on April 20, 1997. Further in his June 2, 1997 report, Dr. McPhilemy, appellant's treating physician, stated that appellant had been asymptomatic prior to the April 20, 1997 car accident. Since the medical evidence does not establish that the worsening of appellant's condition was due to his work-related injury, but due to an intervening cause, appellant has failed to establish that he is unable to perform the position of a paralegal.

[4] *See Dana Bruce*, *supra* note 2 at 144-45 (1992).

[5] Larson, *The Law of Workers' Compensation* § 13.00; *see also Stuart K. Stanton*, 40 ECAB 859 (1989).

[6] *Id.* at 13.11(a).

The decision of the Office of Workers' Compensation Programs dated December 4, 1997 is hereby affirmed.

Dated, Washington, D.C.
March 27, 2000

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member