U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT C. DeRICO and DEPARTMENT OF THE INTERIOR, RACE POINT RANGER STATION, Provincetown, MA

Docket No. 99-659; Submitted on the Record;
Issued March 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether appellant's left knee condition is causally related to the accepted work injury of September 27, 1990; (2) whether appellant is entitled to compensation for wage loss from September 27, 1990 through April 15, 1993; (3) whether appellant is entitled to more than a five percent permanent impairment of the right lower extremity for which he received a schedule award; and (4) whether the Office of Workers' Compensation Programs properly determined that appellant has no employment-related loss of wage-earning capacity.

Appellant, then a 40-year-old park ranger, filed a claim for the pain in both knees he sustained on September 27, 1990 when he tripped and fell over a broken tree limb. He stopped work that day but returned to full duty on November 7, 1990. Appellant's term appointment was set to expire by December 1, 1990. His claim was approved for a right knee contusion with subsequent arthroscopic surgery.

In an October 1, 1990 report, Dr. Richard O'Keefe, an orthopedic surgeon, opined that appellant sustained an articular chondral injury to the patella. Appellant was released to light-duty work with no excessive walking and no heavy lifting on October 4, 1990. On October 22, 1990 Dr. O'Keefe reexamined him and recommended physical therapy to assist in strengthening appellant's right knee.

In an October 29, 1990 medical report, Dr. Robert A. Ruggiero, a Board-certified orthopedic surgeon, noted that appellant complained of right knee pain after a fall at work on September 27, 1990. Examination and x-rays of the right knee revealed no definite fracture, but a possible injury to the tibial bone. Dr. Ruggiero diagnosed post-traumatic chondromalacia of the right patella. He opined that appellant could continue his job as a park ranger as he was able to walk, go up and down stairs and squat without difficulty.

Appellant received physical therapy from November 14 through November 29, 1990.

Appellant presented to Dr. Ruggiero on December 13, 1990 and May 2, 1991 with complaints of right knee pain. He was advised to continue wearing his open patellar sleeve and to limit his activities.

From June 1991 through August 1991, appellant worked a seasonal appointment as a park ranger at the Assateague Island National Seashore. From January 1992 through May 1992, he worked three part-time jobs as a waiter, a bartender and a cashier.

A November 10, 1992 magnetic resonance imaging (MRI) scan of appellant's knees revealed moderately advanced chondromalacia patella of the right knee and diffuse advanced chondromalacia patella of the left knee.

On April 16, 1993 appellant underwent right knee surgery by Dr. Robert P. Good, a Board-certified orthopedic surgeon. An arthroscopic chondroplasty patella, chondroplasty medial femoral condyle, chondroplasty lateral tibial plateau and limited synovectomy of the right knee were performed.

In an August 30, 1993 report, Dr. Good noted examination findings and opined that appellant's symptoms were secondary to degenerative arthritis of the patellofemoral joint of both knees, right more severe than left. He stated that he believed the right knee was most symptomatic because of the September 1990 work injury, either by direct cause or aggravation. Appellant would have recurring episodes of discomfort in the anterior aspect of both knees and should avoid any job that required significant climbing, bending, stooping or lifting, which would tend to aggravate his symptoms.

On May 18, 1993 appellant began working as a self-employed innkeeper. In 1993 and 1994, appellant reported earnings of $2,500.00. In 1995, he reported earnings of $5,000.00. These earnings were verified in an itemized statement of earnings from the Social Security Administration.

On November 8, 1993 appellant claimed compensation for wage loss beginning September 27, 1990.

In a December 16, 1993 report, Dr. Good noted that appellant had recently purchased an inn and was functioning as an innkeeper. He reported examination findings and released appellant from care, to return only on a per needed basis.

In an August 18, 1994 report, Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon and Office referral physician, noted the medical history stemming from the work injury. He diagnosed bilateral chondromalacia of the patellae, most pronounced on the right. Dr. Didizian stated that it was unusual to have advanced chondromalacia from one injury. He opined that patellofemoral degeneration preceded the September 27, 1990 injury and the left knee developed symptomatology as a result of the degenerative process. Dr. Didizian recommended that appellant exercise and avoid certain activities such as kneeling, squatting and climbing ladders or steps for the rest of his life. He noted that appellant was currently an

innkeeper and that, as long as appellant stayed within the restrictions and exercised properly, his prognosis was favorable.

In an internal Office memorandum dated November 17, 1995, the Office stated that appellant's tax returns from 1991 through 1993 did not adequately represent his wage-earning capacity. The tax returns revealed that appellant had virtually no income every year, only about $2,500.00, but showed increasing interest income. In 1991 through 1992, approximately $150.00 in interest income was reported; in 1993, approximately $9,000.00 was reported; and in 1994, almost $15,000.00 in interest income was reported.

In a January 31, 1996 medical report, Dr. Edwin Singsen, a Board-certified orthopedic surgeon and an Office referral physician, noted the history of injury and medical treatment appellant received. He diagnosed traumatic chondromalacia right patella, generalized degenerative arthritis of both knees and specific degenerative changes in the right knee in the femoral condyle and tibial plateau not related to the area of injury. Dr. Singsen found that, in all medical probability, appellant's right chondromalacia was an exacerbation of an underlying preexisting arthritic condition which was now present in both knees. He stated that, under the American Medical Association, *Guides to the Evaluation of Permanent Impariment*[1] on page 83, appellant had a two percent whole person or a five percent lower extremity permanent impairment. Dr. Singsen stated that appellant's work-related injury had stabilized, but appellant would most likely experience arthritic changes in both knees. He added that appellant should not work as a park ranger, but could work full time as an innkeeper.

On July 3, 1996 an Office medical adviser agreed that appellant had a five percent right leg impairment. By order dated July 15, 1996, the Office awarded appellant compensation for a five percent permanent impairment of the right lower extremity. The award ran from January 31 to May 10, 1996.

By decision dated December 2, 1996, the Office denied appellant's claim for wage loss from December 1, 1990 through April 15, 1993 on the grounds that the medical evidence failed to establish that appellant was disabled from his job as a park ranger due to his accepted right knee injury prior to April 16, 1993, the date he underwent right knee surgery.

Appellant requested a hearing and submitted additional evidence. In reports dated September 1, 1995 and March 17, 1997, Dr. Edward V. Reardon, an osteopath specializing in rheumatology, stated that appellant had been under his care since December 5, 1994 for bilateral knee pain secondary to osteoarthritis. He opined that this problem was induced by the injuries appellant sustained in September 1990 while working for the National Park Service. Dr. Reardon stated that appellant had a flare-up of his condition and was seen on November 26, 1996. He again opined that the recent flare-up of appellant's knee difficulties were directly related to the work injury of September 1990.

In a December 29, 1997 report, Dr. Good stated that appellant was able to work in a limited capacity as a ranger at Assateague Island through the summer of 1991. He noted that this

[1] A.M.A., *Guides* (4th edition).

job did not require prolonged climbing and appellant was basically working out of his vehicle. Dr. Good added that appellant did not believe he was able to return to the more rigorous regular duties of a park ranger. Appellant had continued pain and an examination of both knees revealed motion from 0 to 130 degrees with no evidence of cruciate or collateral instablility. Palpable patellofemoral crepitus and some peripatellar discomfort were noted. Probable post-traumatic chondromalacia patella, bilaterally, was diagnosed.

Dr. Good restricted appellant from squatting, stooping and knee-bending exercises or any other type of occupation which required prolonged climbing, bending or walking. He reiterated his opinion that appellant's current symptoms were a direct result of the work injury of 1990. Dr. Good additionally opined that the work injury appeared to have aggravated the arthritic changes. He added that appellant would be unable to return to work as a park ranger and would need to continue to work in sedentary occupations indefinitely.

In a January 6, 1998 report, Dr. Reardon stated that, based on a December 22, 1997 examination, appellant had a permanent disability of 10 percent in both his left and right knees as a direct result of the aforementioned injury. He noted that he had come to this conclusion after reviewing the A.M.A., *Guides*.

By decision dated February 17, 1998, an Office hearing representative affirmed the July 15, 1996 schedule award decision and the December 2, 1996 decision regarding wage-loss compensation from September 1990 to April 16, 1993. The hearing representative remanded the case for further development regarding appellant's left knee condition, as well as the claim for compensation from April 16 through May 17, 1993, when appellant started his self-employment as an innkeeper, and the determination of appellant's loss of wage-earning capacity beginning May 18, 1993.

The Office found that appellant was entitled to compensation from April 16 through May 17, 1993. By decision dated August 25, 1998, the Office denied appellant's claim that his left knee condition was causally related to the September 27, 1990 work injury.

On May 1, 1998 the Office referred appellant to vocational rehabilitation services. In a report dated May 10, 1998, an Office rehabilitation counselor opined that, based on the restrictions noted by Dr. Sinsgen, appellant "should be able to work" and "should avoid squatting, kneeling, ladders or heavy physical work." Attached to the report were job descriptions, including manager, lodging facilities (DOT #: 320.137-014). The counselor opined that this position was available in sufficient numbers within appellant's commuting area.

In an August 3, 1998 report, the Office rehabilitation specialist closed appellant's case based on the recommendation of the rehabilitation counselor and the fact that appellant was employed as an innkeeper and wished to remain in his current position.

In a letter dated September 29, 1998, the Office requested appellant to provide a detailed description of his innkeeper duties, including the number of hours worked. He was additionally asked to include the salary he would pay someone to perform those services. No response was received.

The Office rehabilitation specialist requested that the rehabilitation counselor provide information on the salary for the position of innkeeper/manager in appellant's locality from 1993 through 1998. The counselor subsequently reported that for the position of manager, lodging facilities, available wage data for 1996 indicated $39,400.00 per year.

By decision dated December 1, 1998, the Office reduced appellant's compensation to reflect his wage-earning capacity in the selected position of manager, lodging facilities. The Office found that appellant had no entitlement to wage-loss benefits because he was able to earn $19,869.00 per year as a park ranger and was currently capable of earning $39,400.00 per year in the selected position.

The Board finds that appellant has not established that his left knee condition is causally related to the accepted work injury on September 27, 1990.

An employee seeking benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his or her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[3] These are essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.[4]

Causal relationship is a medical issue[5] and the medical evidence required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized medical opinion on whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty[6] and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[7]

Although appellant fell on both knees on September 27, 1990, there is no mention of medical treatment or symptoms for appellant's left knee until two years after the injury. Dr. Good first mentions osteoarthritis and bilateral patellofemoral joint disease in both knees in

[2] 5 U.S.C. §§ 8101-8193.

[3] *Elaine Pendleton*, 40 ECAB 1143 (1989).

[4] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[5] *Mary A. Howard*, 45 ECAB 646 (1994); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

[6] *See Morris Scanlon*, 11 ECAB 394, 385 (1960).

[7] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, *supra* note 4.

his November 23, 1992 report. In his August 30, 1993 report, Dr. Good opined that appellant's symptoms were secondary to degenerative arthritis of the patellofemoral joint of both knees, the right more severe than the left, but stated that it was impossible to determine the degree to which the symptoms were attributable to the work injury or to appellant's preexisting, asymptomatic condition. This opinion is speculative and therefore of diminished probative value.[8]

Other medical reports do not provide any support for a causal relationship between appellant's left knee condition and the September 27, 1990 injury. Instead, Dr. Didizian opined that appellant's left knee symptomatology was the result of a degenerative process. Furthermore, the Board has noted that neither the fact that the condition became apparent during a period of employment nor the belief of appellant that the condition was caused or aggravated by employment conditions is sufficient to establish causal relation.[9] Accordingly, the Office properly found that appellant did not meet his burden of proving that his left knee condition was causally related to the September 27, 1990 incident.

The Board also finds that appellant is not entitled to wage-loss compensation from September 27, 1990 through April 15, 1993.

Appellant bears the burden of submitting probative medical evidence establishing that he was unable to work as a park ranger from September 1991 until his right knee surgery on April 16, 1993. Following the injury, appellant returned to light-duty work. In a report dated October 29, 1990, Dr. Ruggiero opined that appellant could continue his job as a park ranger as he was able to walk, go up and down stairs and squat without difficulty. Dr. Good first examined appellant on November 23, 1992, but did not provide an opinion regarding appellant's disability status. In his December 29, 1997 report, Dr. Good noted that appellant believed that he could not perform his regular duties as a ranger, but he did not provide his own opinion regarding appellant's disability status. Because the record is devoid of any medical opinion on the issue of whether appellant was disabled from working as a park ranger prior to his April 16, 1993 right knee surgery, appellant's claim for compensation during this period was properly denied.

The Board finds that appellant has no more than a five percent permanent impairment of his right lower extremity, for which he has received a schedule award.

The schedule award provision of the Act[10] and its implementing regulation[11] set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. Where the loss of use is less than 100 percent, the amount of compensation is paid in proportion to the percentage loss of use.[12] However, neither the Act nor

[8] *Geraldine H. Johnson*, 44 ECAB 745 (1993).

[9] *Bruce E. Martin*, 35 ECAB 1090 (1984); *Margaret A. Donnelly*, 15 ECAB 40 (1963); *Dorothy P. Goad*, 5 ECAB 192 (1952).

[10] 5 U.S.C. §§ 8101-8193.*; see* 5 U.S.C. § 8107(c).

[11] 20 C.F.R. § 10.304.

[12] 5 U.S.C. § 8107(c)(19).

its regulations specify the manner in which the percentage of loss of use of a member is to be determined. For consistent results and to ensure equal justice under the law to all claimants, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants seeking schedule awards. The A.M.A., *Guides* (fourth edition) have been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[13]

In this case, the Office medical adviser determined that appellant had a five percent permanent impairment of his right lower extremity by applying the standards of the A.M.A., *Guides* (fourth edition) to Dr. Singsen's findings. Dr. Singsen performed a complete examination on January 31, 1996, reviewed the record and advised how he calculated appellant's five percent lower extremity impairment under the A.M.A., *Guides*. While Dr. Reardon in his report of January 6, 1998 stated that appellant had a 10 percent permanent impairment in both knees, Dr. Reardon failed to provide an explanation for his opinion or state how he calculated this rating of both knees under the A.M.A., *Guides*.[14] The Office properly found that appellant had no more than a five percent impairment of his right lower extremity.

Lastly, the Board finds that appellant has no employment-related loss of wage-earning capacity.

Under section 8115(a) of the Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[15] If the actual earnings do not fairly and reasonably represent wage-earning capacity or the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, the degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors or circumstances which may affect his wage-earning capacity in his disabled condition.[16]

In this case, the Office made a retroactive determination of appellant's wage-earning capacity using the constructed position of a "live-in" manager, lodging facilities. The Office's Federal (FECA) Procedure Manual provides that a retroactive constructed loss of wage-earning capacity should be considered only when the evidence clearly shows that partial, rather than total disability, existed prior to the adjudication and no compensation has been paid for the period of disability in question.[17] In cases meeting these criteria, the claims examiner must first determine

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[13] *Thomas D. Gunthier,* 34 ECAB 1060 (1983). In this case, the fourth edition of the A.M.A., *Guides* provides the appropriate standards for evaluating appellant's right lower extremity impairment in that the Office's decision pertaining to appellant's right lower extremity was issued after November 1, 1993, the effective date of the fourth edition of the A.M.A., *Guides; see* FECA Bulletin No. 94-4 (issued November 1, 1993).

[14] *See William O'Keefe,* 34 ECAB 39 (1982).

[15] 5 U.S.C. § 8115(a).

[16] *Alfred R. Hafer,* 46 ECAB 553, 556 (1995).

[17] *See* Federal (FECA) Procedure Manual, Part 2 -- *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(f) (December 1995); *see also* Chapter 2.814.8(f) (December 1993).

whether the claimant had any actual earnings and, if so, must then follow the guidelines for determining wage-earning capacity based on actual earnings.[18]

In this case, the record establishes that appellant had actual earnings from employment as park ranger from June 1991 through August 1991; worked three part-time jobs as a waiter, a bartender and a cashier from January 1992 through May 1992; and began working as self-employed innkeeper from May 18, 1993 to the present, thereby evidencing a partial disability for the period in question prior to the Office's wage-earning capacity adjudication. Initially, the Office had reviewed appellant's tax returns for 1991 through 1994 and commented that "no way the tax returns adequately represent [appellant's] wage-earning capacity." The Office then sent out a letter dated September 29, 1998 requesting pertinent information about appellant's innkeeper duties, including the salary appellant would have to pay someone to perform such duties.[19]

In the attached memorandum to its decision, the Office properly noted that appellant failed to respond to its September 29, 1998 letter. The gross earnings of a self-employed individual minus the direct expenses of operating the business (*e.g.*, equipment costs, insurance, taxes), but not depreciation or other accounting measures used to determine net profit, are necessary to calculate the amount of actual earnings for a self-employed individual.[20] Since appellant failed to supply the requested information concerning his innkeeper duties, the Office had no actual earnings upon which to base its wage-earning capacity calculation. Accordingly, the Office had no choice but to proceed to a selected position to determine appellant's loss of wage-earning capacity.

Through contact with the rehabilitation counselor, the Office determined that the selected position of manager, lodging facilities, reasonably represented appellant's wage-earning capacity. The vocational counselor identified the selected position listed in the Department of Labor's *Dictionary of Occupational Titles* and provided the required information concerning the position descriptions, the availability of the positions within appellant's commuting area and pay ranges within the geographical area. The vocational rehabilitation counselor determined that this position was in accord with appellant's background, education and experience and was reasonably available within his geographical area in 1996. The counselor reported that the position was appropriate for appellant in view of Dr. Singsen's January 31, 1996 report.

Based on his restrictions and on the vocational counselor's recommendations, the Office selected the position of manager, lodging facilities, which it found suitable for appellant. The Office noted that the position described contained medium physical requirements, which was consistent with the recommendations of Dr. Singsen, and used the information provided by the rehabilitation counselor regarding the prevailing wage rate in the area of a manager, lodging

[18] *Id.*

[19] The Board notes that, although the September 29, 1998 letter appears to be addressed to appellant's attorney, a presumption exists that appellant would have knowledge of the letter and, thus, would have known that the Office needed the requested information.

[20] *See Thomas Jordan*, 47 ECAB 382 (1996).

facilities, to ascertain the wages of the position. Therefore, the Office properly based appellant's wage-earning capacity on the selected position of manager, lodging facilities, to determine that appellant's entitlement to wage-loss benefits due to the residuals of his work injury was zero.

The decisions of the Office of Workers' Compensation Programs dated December 1, August 25 and February 17, 1998 are hereby affirmed.

Dated, Washington, DC
March 1, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member