U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. FOWLER and DEFENSE LOGISTICS AGENCY, DEFENSE GENERAL SUPPLY CENTER, Richmond, VA

Docket No. 02-1570; Submitted on the Record;
Issued October 15, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined appellant's loss of wage-earning capacity, based upon his actual wages as a counter sales person; and (2) whether appellant has established that he sustained a recurrence of total disability commencing August 1, 2001, causally related to his July 15, 1999 employment injury.

The Office accepted that on July 15, 1999 appellant, then a 45-year-old production machinery mechanic, sustained a left shoulder strain, lumbar strain and permanent aggravation of degenerative joint disease when he was involved in a motor vehicle accident while in the performance of his duties. Appellant received appropriate compensation and medical benefits and, on May 22, 2000, his treating physician noted that a functional capacity evaluation demonstrated that he was capable of light to medium work. An Office Form OWCP-5 was completed and vocational rehabilitation was recommended.

Vocational rehabilitation and testing was undertaken, it was determined that the position of a parts salesperson was consistent with appellant's work restrictions. His treating physician approved the specific job activity description for counter sales/service writer with Biglerville Tire & Auto as appropriate to his disabled condition. On April 30, 2001 appellant accepted and started a full-time job, 42 to 45 hours a week, as a counter sales/service writer at Biglerville Tire & Auto. It was noted that he would be paid $7.50 an hour for the first month and $8.50 an hour after 30 days.

On May 8, 2001 the rehabilitation counselor noted that appellant was working full-time employment with all going well and noted that the employer was not interested in the reemployment assisted wage subsidy as he was very satisfied with appellant's job performance.

Appellant continued to work at Biglerville Tire & Auto until August 1, 2001 when he was laid off for financial reasons. The employer stated that appellant was laid off due to decreased workload not justifying an extra person on the payroll.

On August 29, 2001 appellant filed a claim alleging that on August 1, 2001 he sustained a recurrence of total disability as his job had been terminated.

A medical report from appellant's treating physician, Dr. Joseph P. Krzeminski, a Board-certified neurosurgeon, dated October 22, 2001 indicated that appellant continued to have activity-related low back pain but was able to do light-duty tasks with no lifting greater than 20 pounds and avoidance of bending, twisting, pushing and pulling. Appellant provided a November 8, 2001 statement indicating that his physical condition had been unchanged from the date he returned to work with the private employer in April 2001. He reiterated that he had been laid off from Biglerville Tire & Auto for economic reasons.

By decision dated December 21, 2001, the Office rejected appellant's recurrence of disability claim finding that he had not demonstrated a change in the nature or extent of his injury-related condition or a change in the nature or extent of his light-duty job requirements. The Office found that Dr. Krzeminski's October 22, 2001 report reinforced that there had been no change in appellant's injury-related condition to establish a recurrence of total physical disability causally related to the July 15, 1999 employment accident, as he found appellant still capable of light duty.

In a second decision dated December 21, 2001, the Office determined that the position of counter sales/service writer fairly and reasonably represented appellant's wage-earning capacity. The Office determined that since appellant had been working at a full-time position as a counter sales person for more than 60 days, with wages of $340.00 a week, this position fairly and reasonable represented his wage-earning capacity. It determined what the pay rate for appellant's date-of-injury position was, compared it to his present wages and properly applied the *Shadrick* formula[1] which resulted in the percentage of appellant's loss of wage-earning capacity. His compensation was reduced accordingly.

By undated letter received on February 1, 2002, appellant objected to the rejection of his recurrence claim and the loss of wage-earning capacity determination, claiming that he was fired from Biglerville Tire & Auto because workers' compensation did not pay Biglerville Tire & Auto three fourths of his pay for a couple of months and one half of his pay for the rest of his employment.

By decision dated April 23, 2002, the Office denied modification of the December 21, 2001 decision. The Office found that appellant's hiring at Biglerville Tire & Auto was not contingent upon the employer receiving a partial wage subsidy from the Office and that appellant's representative's argument that the position there was temporary and, therefore, was not appropriate upon which to base a wage-earning capacity, was not supported by the case record. The Office advised that, although wage subsidy to an employer to assist in placement efforts did exist under the Federal Employees' Compensation Act, there was no indication in the case record that such an agreement had been entered into in appellant's case and that the rehabilitation counselor had indicated that the employer was satisfied with appellant and was not interested in a wage subsidy. The Office found that since no such agreement to provide a wage subsidy had been made, there was no basis to consider the argument that appellant's termination

[1] *Albert C. Shabdrick*, 5 ECAB 376 (1953).

from employment was due to a lack of such wage subsidy being paid to the employer. The Office also advised that there was no indication that the position appellant was hired for was temporary. It advised that a temporary position was defined as one, which, at the outset, had a preset term or period of employment. The Office advised that there was no evidence that such was the case here and the fact that appellant's job was terminated after three months due to economic reasons did not establish the position as temporary or inappropriate upon which to base a loss of wage-earning capacity determination.

The Board finds that the Office properly determined appellant's loss of wage-earning capacity, based upon his actual wages as a counter sales person.

Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age, vocational qualifications and the availability of suitable employment.[2] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity are reasonably available in the general labor market in the commuting area in which the employee lives. In determining an employee's wage-earning capacity, the Office may not select a makeshift or odd lot position or one not reasonably available on the open labor market.[3]

Under 5 U.S.C. § 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent his wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[4]

Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[5] In the present case, there is no such evidence showing that appellant's wages at Biglerville Tire & Auto do not fairly and reasonably represent his wage-earning capacity.

Further, the Office's procedure manual provides that a retroactive determination may be made where an employee has worked in the position for at least 60 days, the employment fairly

[2] *See generally* 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Betty F. Wade*, 37 ECAB 556 (1986).

[3] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[4] *See also Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

[5] *Dennis E. Maddy*, 47 ECAB 259 (1995).

and reasonably represents his wage-earning capacity and the work stoppage did not occur because of any change in his injury-related condition affecting his ability to work.[6]

In this case, appellant had been working for more than the minimum of 60 days in the full-time position with Biglerville Tire & Auto; the position was full time and not sporadic, seasonal, or temporary[7] and was suitable to his disabled condition, as established by his physician's approval. He worked in the position without physical problems until he was unfortunately terminated for financial reasons. This termination did not constitute a recurrence of total disability, as appellant did not again become totally disabled as supported by the medical evidence of record. His ability to and capacity for performing light-duty work had been established by his successful employment at Biglerville Tire & Auto for a period greater than 60 days and, therefore, he had demonstrated his physical ability to work. The fact that he no longer has a job does not affect this demonstrated ability to perform light-duty work. The Office is not obligated to actually secure employment for appellant.[8] Further, the fact that he no longer is employed does not affect his wage-earning capacity determination as it is based upon his ability to perform work which he demonstrated for a period of greater than 60 days and not on whether or not he is currently employed.

The Board further finds that appellant has not established that he sustained a recurrence of total disability commencing August 1, 2001, causally related to his July 15, 1999 employment injury.

As used in the Act,[9] the term "disability" means incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[10] An individual who claims a recurrence of disability due to an accepted employment injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury. This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that appellant has again become totally disabled, that the disabling condition is causally related to the employment injury and that the causal relationship is established by the evidence of record and supports that conclusion with

[6] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814(7)(e) (May 1997); *see also Elbert Hicks*, 49 ECAB 283 (1998).

[7] As determined at its outset, temporary positions have a set period with an identifiable date of termination.

[8] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[9] 5 U.S.C. §§ 8101-8193.

[10] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17). Disability is not synonymous with physical impairment. An employee who has a physical impairment, even a severe one, but who has the capacity to earn the wages he was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to disability compensation. *See Gary L. Loser*, 38 ECAB 673 (1987) (although the evidence indicated that appellant had sustained a permanent impairment of his legs because of thrombophlebitis, it did not demonstrate that his condition prevented him from returning to his work as a chemist or caused any incapacity to earn the wages he was receiving at the time of injury).

sound medical reasoning.[11] Causal relationship is a medical issue and can be established only by medical evidence.[12]

Further, when an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden of establishing by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of his burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[13]

In the instant case, Dr. Krzeminski's October 22, 2001 report reinforced that there had been no change in appellant's injury-related condition to establish a recurrence of total physical disability, causally related to the July 15, 1999 employment accident, as he identified no such total disability recurrence and instead found appellant still capable of light duty. Further, appellant has not presented any evidence that the requirements of the light-duty position to which he returned were changed in any way, causing his claimed recurrence of disability, nor has he presented any evidence establishing a change in the nature or extent of his injury-related condition, as Dr. Krzeminski supported that appellant's condition was unchanged and that he remained able to perform light duty. Therefore, appellant has not established that he sustained a recurrence of total disability on August 1, 2001 causally related to his July 15, 1999 employment injury.

[11] *Stephen T. Perkins*, 40 ECAB 1193 (1989); *Dennis E. Twardzik*, 34 ECAB 536 (1983); *Max Grossman*, 8 ECAB 508 (1956); 20 C.F.R. § 10.121(a).

[12] *Mary J. Briggs*, 37 ECAB 578 (1986); *Ausberto Guzman*, 25 ECAB 362 (1974).

[13] *Terry R. Hedman*, 38 ECAB 222 (1986).

Therefore, the decisions of the Office of Workers' Compensation Programs dated December 21, 2001 and April 23, 2002 are hereby affirmed.

Dated, Washington, DC
October 15, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member