U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PERCY L. McGEE and U.S. POSTAL SERVICE,
POST OFFICE, St. Louis, MO

Docket No. 03-1174; Submitted on the Record;
Issued November 6, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for surgery; and (2) whether the Office properly determined that appellant's limited-duty position fairly and reasonably represented his wage-earning capacity.

On July 29, 1998 appellant, then a 50-year-old elevator operator, filed a notice of traumatic injury alleging that on July 22, 1998 he hurt his right shoulder while pushing "a BMC and wire cages on an elevator" in the performance of duty. The Office accepted the claim for a right rotator cuff tear and authorized surgery consisting of open compression and repair of the rotator cuff, which was performed on August 25, 1998. Appellant received appropriate disability compensation and returned to a limited-duty position. On April 29, 1999 appellant filed a second traumatic injury claim alleging that he hurt his right shoulder, left leg and back on April 28, 1999 while pushing and pulling containers of mail. The Office accepted the claim for lumbar spasms, a herniated disc at L3-4 and temporary aggravation of cervical spondylosis. The Office later expanded the claim to include the consequential condition of depression.[1] Appellant was off work from April 28 to July 7, 1999, when he returned to limited duty.

On June 8, 2001 appellant underwent a magnetic resonance imaging scan that revealed evidence of degenerative changes as well as central disc protrusions from C3-7. There was no mention of impingement of any particular nerve root. A myelogram and post-myelogram computerized tomography scan was performed on October 12, 2001 and showed degenerative disc disease with impingment of the left exiting nerve root at C5-6 and impingement of the right exiting nerve root at C3-4 and C4-5. On January 18, 2002 the Office received a surgical request from appellant's treating physician, Dr. Faisal Albanna, a Board-certified neurosurgeon, seeking authorization for a four level anterior cervical discectomy and fusion (ACDF 4 level) with peak planting to correct cervical spondylosis secondary to osteophyte formation or spur formation at C3-4, C4-5, C5-6 and C6-7. In a January 22, 2002 treatment note, Dr. Albanna explained that he

[1] The two claims were doubled under master file number 110166261.

felt surgery was necessary because appellant showed early signs of cervical myelopathy as demonstrated by the myelogram results showing compromise of the spinal canal. He further noted that appellant exhibited urinary incontinence and stiffness of gait consistent with his diagnosis of cervical myelopathy.

In order to ascertain whether the requested surgery was medically necessary to treat appellant's accepted work injuries, the Office referred appellant's case file to an Office medical adviser, Dr. David H. Garelick, for review. The Office specifically asked the Office medical adviser to offer an opinion as to whether appellant's diagnosed cervical spondylosis was causally related to the accepted work-related conditions. In a February 4, 2002 report, the Office medical adviser recommended that appellant be seen by a Board-certified orthopedic surgeon for a second opinion evaluation of his right shoulder to rule out impingement or rotator cuff disease as potential sources for appellant's continuing complaints of right upper extremity pain. The Office medical adviser noted that appellant suffered from degenerative disc disease of the cervical spine and opined that his work duties probably caused a permanent aggravation of that condition.

Accordingly, the Office referred appellant for a second opinion evaluation with Dr. Michael E. Chabot, an osteopath. In a report dated April 1, 2002, Dr. Chabot discussed appellant's history of injury and complaints of continuing right shoulder, lower back and left leg pain. On physical examination he obtained range of motion findings for the cervical and lumbar spine as well as the shoulder. He noted a negative impingement sign for the right shoulder and stated that the right shoulder range of motion was near normal. He attributed appellant's neck and lower back complaints to degenerative disc disease and stated that the progression of the disease was neither related nor exacerbated by his work duties. He noted that appellant's radicular symptoms appeared to have resolved and opined that appellant suffered from chronic pain associated with residuals for post-traumatic stress disorder. Dr. Chabot stated that surgical intervention to the cervical spine was not a reasonable recommendation since there was no objective clinical findings that would be regarded as radicular or myelopathic in origin. He indicated that appellant might require surgery in the future for his nonwork-related chronic degenerative condition. In a supplement report dated April 29, 2002, Dr. Garelick reiterated that, while "[appellant] does have signs and symptoms consistent with degenerative arthritis in his cervical spine, there are no significant objective findings that support any radicular or myelopathic findings." He noted that cervical decompression and fusion is performed to treat radiculopathy or myelopathy and, since appellant did not manifest symptoms consistent with either diagnosis, he had to recommend against surgery.

In a decision dated May 22, 2002, the Office denied authorization of the requested surgical procedure as not medically necessary as a result of the accepted work injury of ACDF 4 level fusion with peak planting, noting that there was no objective medical evidence to support that the procedure was medically necessary at that time.[2]

On November 25, 2002 appellant accepted an offer for a permanent limited-duty assignment.

[2] By letter dated May 10, 2002, the Office accepted that appellant's work injury resulted in a permanent aggravation of cervical disc spondylosis.

In a March 20, 2003 decision, the Office determined that appellant's limited-duty position fairly and reasonably represented his wage-earning capacity and that he had no loss of wage-earning capacity since his actual earnings met or exceeded the current wages of the job he held at the time of his injury. Accordingly, the Office terminated appellant's disability compensation. The Office, however, noted that appellant continued to be entitled to medical benefits.

The Board finds that the case is not in posture for a decision with respect to appellant's surgical request.

Section 8103(a) of the Federal Employees' Compensation Act states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of disability, or aid in lessening the amount of the monthly compensation."[3] In order to obtain authorization for surgery, appellant must establish that the surgery is necessary for treatment of the effects of the employment-related injury.[4] Proof of causal relation must include supporting rationalized medical evidence.

In this case, the Board finds that a conflict exists in the medical record with regard to whether appellant demonstrates any objective evidence of myelopathy to support his request for surgery consisting of ACDF 4 level fusion with peak planting. The Board notes that Dr. Albanna has supported his recommendation for surgery on the myelogram, which showed some compromise of the cervical spinal cord. In contrast, Dr. Chabot noted in his April 1, 2002 report that surgery was not medically necessary since there was evidence of radicular or myelopathic findings. Because Dr. Chabot's opinion does not adequately address the importance of the myelogram or the physical findings noted by Dr. Albanna, the Board finds that this case must be sent to an impartial medical examiner for resolution of the conflict.[5] The Office shall schedule appellant with an impartial medical specialist to ascertain whether the requested surgery is medically necessary to treat his accepted work-related conditions. The Office should prepare a statement of accepted facts to accompany the examination request indicating the exact conditions which are found to be work related or attributable to appellant's work injuries.

The Board, however, finds that the Office properly determined that appellant's limited-duty position fairly and reasonably represented his wage-earning capacity.

Section 8115(a) of the Act[6] provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his

[3] 5 U.S.C. § 8103; *see Robert S. Winchester*, 53 ECAB _____ (Docket No. 00-800, issued November 8, 2002).

[4] *See Cathy B. Millin*, 51 ECAB 331, 333 (2000); *Francis H. Smith*, 46 ECAB 392, 394 (1995).

[5] 5 U.S.C. § 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician for the employee, the Secretary shall appoint a third physician who shall make an examination; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

[6] 5 U.S.C. §§ 8101-8193.

actual earnings fairly and reasonably represent his wage-earning capacity.[7] 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.[8] After the Office determines that appellant's actual earnings fairly and reasonably represent his or her wage-earning capacity, application of the principles set forth in the *Albert C. Shadrick*[9] decision will result in the percentage of the employee's wage-earning capacity.[10] This has been codified by regulation at 20 C.F.R. § 10.403. Section 10.403(d) provides that the employee's wage-earning capacity in terms of percentage is obtained by dividing the employee's actual earnings by the current pay rate for the job held at the time of injury.[11] Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days.[12]

The Office determined that appellant's limited-duty position fairly and reasonably represented his wage-earning capacity and that he had no loss of wage-earning capacity since his actual earnings met or exceeded the current wages of the job he held at the time of his injury. The Board has carefully reviewed the record and finds that the Office properly determined that the pay rate for appellant's job when his injury was incurred was $753.42 and that his actual wages in the modified-duty position was equal to that amount. Accordingly, under the *Shadrick* formula, appellant had no loss of wage-earning capacity. The Board further notes that there was no evidence of record that the modified position accepted by appellant was part time, seasonal or on call, which could preclude the Office from relying on his actual wages to calculate his loss of wage-earning capacity.[13] Accordingly, the Board finds that the Office correctly determined that appellant's modified job, which he held for at least 60 days, fairly and reasonably represented his wage-earning capacity, and that appellant had no further wage-loss disability for purposes of entitlement to compensation.

[7] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[8] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[9] *Albert C. Shadrick*, 5 ECAB 376 (1953).

[10] *See Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick, supra* note 9.

[11] 20 C.F.R. § 10.403(d) (1999); *see Afegalai L. Boone*, 53 ECAB ____ (Docket No. 01-2224, issued May 15, 2002).

[12] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(a) (December 1993); *see William D. Emory*, 47 ECAB 365 (1996).

[13] *See Loni J. Cleveland*, 52 ECAB 171 (2000).

The decision of the Office of Workers' Compensation Programs dated March 20, 2003 is hereby affirmed, while the Office's decision dated May 22, 2002 is vacated and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
November 6, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member