U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DANIEL M. HUGHES and U.S. POSTAL SERVICE,
RAUINIA POST OFFICE, Highland Park, Ill.

Docket No. 96-900; Submitted on the Record;
Issued April 2, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof in establishing that he was disabled from performing his light-duty job for four hours a day; and (2) whether appellant is entitled to augmentation of his schedule award and wage-loss benefits.

On March 3, 1989 appellant, then a 34-year-old letter carrier, filed a notice of traumatic injury, claiming that he strained his left knee when he slipped and fell on an icy sidewalk while delivering the mail. The Office of Workers' Compensation Progams accepted a left knee sprain and, subsequently, a torn medial meniscus and a stress fracture of the second toe.

On June 18, 1991 the Office issued a schedule award for a 43 percent permanent impairment of the left lower extremity, which ran from March 20, 1991 until August 2, 1993 for a total of 123.84 weeks. Appellant was paid at the rate of 66 2/3 percent because he had no dependents. On December 3, 1992 appellant was paid the remainder of the schedule award, $15,303.29 in a lump sum.

On December 12, 1992 appellant returned to work as a modified distribution clerk, a position that permitted him to sit, stand and walk as tolerable within the physical restrictions imposed by Dr. Robert E. Rosenzweig, a Board-certified orthopedic surgeon.

On July 30, 1993 appellant applied for disability retirement and moved away from the location of the employing establishment. Appellant explained that he had to commute an hour and a half each way and that the pain in his legs was too severe for him to work. Appellant did not return to work.[1]

On July 28, 1994 the Office informed appellant that the modified clerk position which he had held fairly and reasonably represented his wage-earning capacity and the Office was

[1] Appellant was terminated for cause on July 23, 1994.

adjusting his compensation, based on the report of Dr. Bipin B. Bavishi, a Board-certified orthopedic surgeon who examined appellant on March 18, 1994 and concluded that he was capable of working four hours a day. The Office noted that the limited-duty position was still available.

Appellant timely requested a written review of the record, noting that Dr. Rosenzweig had found appellant unable to work. In a decision dated December 11, 1994, the hearing representative found that the medical evidence was insufficient to establish that appellant was incapable of working in the modified position he accepted on November 27, 1992. The hearing representative also found that the limited-duty job fairly and reasonably represented appellant's wage-earning capacity.

Appellant requested reconsideration on April 13, 1995, stating that the Office had failed to consider his dependent daughter in paying wage-loss compensation from August 2, 1993 through April 2, 1995 when appellant elected to receive retirement disability benefits.[2] Appellant also disputed that he was capable of working four hours a day.

On July 11, 1995 the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to warrant review of the prior decision. The Office noted that appellant had provided no evidence regarding his dependent child, despite being informed on May 4, 1995 of the documents required and had submitted no medical evidence showing that he was incapable of working in the modified position.

Appellant again requested reconsideration and submitted copies of the Merit System Protection Board's reversal of the denial of his disability retirement claim, his 1992 tax return and an insurance election form, which showed that he had married on September 12, 1991. He noted that his daughter was born on August 4, 1992. Appellant stated that his schedule award should be adjusted to reflect payment at the 75 percent dependency rate from September 12, 1991 through August 2, 1993 and that his wage-loss compensation should also be adjusted on the same basis from that date until he elected retirement benefits in April 1994.

On December 6, 1995 the Office informed appellant that he needed to submit copies of the termination of any previous marriages as well as the termination of his marriage to his present wife. The Office added that he must provide proof of custody or child support, if applicable and that the pay stubs he had submitted were insufficient because they were undated and failed to show for whom the child support was being paid.

On December 19, 1995 appellant responded that he had filed for divorce in March 1993, that he had moved out of the marital home in April 1993, that his marriage had not been terminated, that he was required to pay child support by court order, which covered the period of April through August 1993 as shown by his pay stubs and that he was not now paying child support because the court had ordered an abatement of the support.

[2] Appellant was initially denied disability retirement but that decision was reversed on appeal on September 20, 1994 and appellant elected to receive retirement benefits under the Federal Employees' Retirement System (FERS).

On December 28, 1995 the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. The Office noted that appellant had failed to submit the evidence requested in its December 6, 1995 letter and had provided no medical evidence showing that he was unable to perform the duties of the modified position he accepted on November 27, 1992 and which he held until July 30, 1993 when he left work and failed to return.

The Board finds that appellant has failed to meet his burden of proof in establishing that he could not do his light-duty job.

When an employee, who is disabled from the job he held when injured, 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 that he cannot perform such light duty.[3] As part of this 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.[4]

In this case, appellant has submitted no evidence that the light-duty work he was doing in 1992 through 1993 changed in any manner. Appellant argued that he was initially placed in a rehabilitation position and was not doing the job of a clerk, but the job description he signed on November 27, 1992 indicated that the light-duty position was titled distribution clerk (modified, rehabilitation).

Appellant stated that he left work at the end of July 1993 because he had moved and found the work and the commute too painful to endure. However, the medical evidence submitted by appellant failed to establish any change in the nature and extent of his left knee condition.

Dr. Rosenzweig, appellant's treating physician, stated on August 24, 1993 that appellant would not be returning to work as of July 30, 1993 because he was permanently disabled. He based this conclusion on the fact that appellant's degenerative arthritic condition involving the medial femoral condyle and the patella femoral joint has "slowed him down considerably and will be a permanent condition." However, Dr. Rosenzweig provided no medical rationale for his opinion in view of the fact that appellant's job, which was a sedentary position, did not require him to move quickly. Nor did Dr. Rosenzweig discuss any change in appellant's knee condition that would prevent him from performing the duties of a distribution clerk.

In his December 15, 1993 report supporting appellant's application for disability retirement, Dr. Rosenzweig, who had last seen appellant in April 1993, stated that appellant had "gone progressively down hill over the last four years due to the initial injury which caused two operations on his left knee." The physician concluded that appellant had had "progressive deterioration of the knee secondary to the trauma and should be completely discharged from duty."

[3] *Richard E. Konnen*, 47 ECAB ___ (Docket No. 94-1158, issued February 16, 1996).

[4] *Gus N. Rodes*, 47 ECAB ___ (Docket No. 93-950, issued February 14, 1995).

Again, Dr. Rosenzweig offered no medical rationale for his general statement that appellant was permanently disabled and failed to address the relevant question of any change in appellant's knee condition. Therefore, the Board finds that appellant has failed to meet his burden of proof in establishing that he is unable to do the clerk's job.[5]

Appellant states on appeal that he does not understand how, if one federal agency finds that he is unqualified to work and grants disability retirement, another agency can find that he is capable of working a light-duty job for four hours a day. The Board notes that the two agencies operate according to different laws. Disability compensation under the Act is not a retirement system like FERS and qualifying for disability retirement is based on different legal standards than proving that one is incapable of performing a light-duty job. Therefore, the fact that appellant qualified for disability retirement has no relevance to his failure to provide a rationalized medical opinion establishing that he is incapable of performing the duties of the modified-clerk position.[6]

The Board finds that this case is not in posture for decision in regard to the issue of augmentation of compensation.

The Office stated in its December 28, 1995 decision that appellant had submitted no evidence in response to its December 6, 1995 request. The record contains appellant's December 19, 1995 letter and copies of two handwritten court orders, all perforated as received by the Office on December 27, 1995, but obviously not considered by the Office.

Further, appellant submitted his marriage certificate, his daughter's birth certificate and copies of pay stubs for pay periods 10 through 15 of 1993, all received by the Office on October 4, 1995. The marriage certificate indicates that appellant was married on September 12, 1991.

Appellant stated in his December 19, 1995 letter that he filed for divorce in March 1993 and was ordered to pay child support after he moved from the marital home. The court order entered on April 23, 1993 confirmed appellant's statement. The pay stubs submitted by appellant indicated that child support, identified by the notation CS/SS, was deducted in the amount of $1,093.80 for pay periods 10 through 15 of 1993. The court order entered on October 12, 1993 indicated that child support was abated, as appellant alleged.

In view of the fact that the Office failed to consider this evidence, the Board will set aside that portion of the December 28, 1995 decision and remands this case for the Office to determine

[5] *See Major W. Jefferson*, 47 ECAB ___ (Docket No. 94-1186, issued January 25, 1995) (finding that a claimant who stops work for reasons unrelated to his work-related physical condition has no compensable disability within the meaning of the Act).

[6] The determinations of other administrative agencies or courts, while sometimes instructive, are not determinative with regard to disability as defined by the Act; *see generally George A. Johnson*, 43 ECAB 712 (1992); *Constance G. Mills*, 40 ECAB 317 (1988); *Fabian W. Fraser*, 9 ECAB 367 (1957); *see also Daniel Deparini*, 44 ECAB 657, 660 (1993) (noting that under the Social Security Act, mental and physical conditions which are not employment related may be considered in determining disability).

whether appellant is entitled to augmentation of his compensation at the 75 percent rate for his wage-loss benefits from August 3, 1993 to April 1995.

The December 28 and July 11, 1995 decisions are affirmed in part and set aside in part and the case is remanded to the Office of Workers' Compensation Programs for further proceedings consistent with this opinion.

Dated, Washington, D.C.
April 2, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member