U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of TORANCE DAVIS and DEPARTMENT OF THE NAVY, NAVAL SHIPYARD, Long Beach, Calif.

Docket No. 96-441; Submitted on the Record;
Issued August 3, 1998

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 that appellant had no loss of wage-earning capacity after August 4, 1992; and (2) whether appellant established that he sustained any disability in the performance of duty.

On March 9, 1985 appellant, then a 36-year-old sheet metal worker, filed a notice of occupational disease, claiming that the rash on his hands was caused by exposure to chemicals and fiberglass at work. The Office accepted the claim for irritant contact dermatitis and paid appropriate compensation. Subsequently, the employing establishment terminated appellant because of the permanent medical limitations that precluded him from performing his duties, and appellant was placed on the periodic rolls.

On May 31, 1992 appellant was reemployed as a temporary clerk and the Office determined that he was entitled to a 56 percent loss of wage-earning capacity. On August 4, 1992 appellant returned to modified work as a sheet metal worker, with the restriction that he not be exposed to chemical solvents, latex or rubber gloves, extreme heat, fiberglass, or "other sensitizing materials," as imposed by Dr. Harvey Abrams, a Board-certified dermatologist, in reports dated June 5 and August 27, 1992. Following a reduction-in-force, appellant was separated from the employing establishment effective August 10, 1994 and received 32 weeks severance pay.

Subsequently, appellant submitted a claim for wage loss from April 7, 1995. In response to the Office's instructions, he filed a notice of recurrence of disability on May 12, 1995, claiming compensation from August 10, 1994 and noting that since he had returned to work he had been exposed to the same chemicals which caused the initial injury and that being forced to wear protective gloves exacerbated his condition.

On July 26, 1995 the Office denied the claim on the grounds that the medical evidence was insufficient to establish that appellant's current condition, or his condition on August 10, 1994, was related to his original work exposure in 1985. The Office noted that if a new injury had occurred, appellant should complete the appropriate form.

On September 13, 1995 the Office retroactively determined that appellant's actual earnings as a sheet metal worker (modified) fairly and reasonably represented his wage-earning capacity on the basis that he was reemployed in this position on August 4, 1992 and earned the same rate of pay as he did when injured. Thus, appellant had no loss of wages after that date.

On September 11, 1995 appellant filed a notice of occupational disease, claiming that his chronic dermatitis was caused by exposure at his work site. On January 8, 1996 the Office denied the claim on the grounds that Dr. Abrams' August 30, 1995 report was insufficient to establish that appellant sustained any disability for work.

The Board finds that appellant had no loss of wage-earning capacity after August 4, 1992 and that the Office properly terminated wage-loss benefits as of that date.

Under the Federal Employees' Compensation Act,[1] once the Office has accepted a claim and paid compensation benefits, it has the burden of proof to establish that an employee's disability has ceased or lessened, thus justifying termination or modification of those benefits.[2] An injured employee who is unable to return to the position held at the time of injury or to earn equivalent wages but who is not totally disabled for all gainful employment is entitled to compensation computed on the loss of wage-earning capacity.[3]

Wage-earning capacity is the measure of the employee's ability to earn wages in the open labor market under normal employment conditions.[4] Section 8106(a)[5] of the Act provides for compensation for the loss of wage-earning capacity during an employee's disability by paying the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.[6]

Section 8115 provides that the wage-earning capacity of an employee is determined by his actual earnings if these fairly and reasonably represent his or her wage-earning capacity.[7] The Board has held that wages actually earned are the best measure of wage-earning capacity; absent contrary evidence, actual earnings must thus be accepted as the proper figure.[8]

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[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] *James B. Christenson*, 47 ECAB ___ (Docket No. 95-1106, issued September 5, 1996); *Wilson L. Clow, Jr.*, 44 ECAB 157, 170 (1992).

[3] 20 C.F.R. § 10.303(a); *Alfred R. Hafer*, 46 ECAB 553, 556 (1995).

[4] *Dennis D. Owen*, 44 ECAB 475, 479 (1993); *Hattie Drummond*, 39 ECAB 904, 907 (1988).

[5] 5 U.S.C. § 8106(a).

[6] An employee's wage-earning capacity in terms of percentage is obtained by dividing the pay rate of the selected position by the current pay rate for the date-of-injury job; the wage-earning capacity in terms of dollars is computed by multiplying the pay rate for compensation purposes, as defined at 20 C.F.R. § 10.5(a)(20), by the percentage of wage-earning capacity and subtracting the result from the pay rate for compensation purposes to obtain the employee's loss of wage-earning capacity. 20 C.F.R. § 10.303(b).

[7] 5 U.S.C. § 8115(a); *Lawrence D. Price*, 47 ECAB ___ (Docket No. 93-2007, issued October 4, 1995).

[8] *Clarence D. Ross*, 42 ECAB 556 (1991).

In this case, appellant initially returned to work on May 31, 1992 as a temporary clerk, and the Office determined that he had a 56 percent loss of wage-earning capacity. Appellant accepted a permanent position as a sheet metal worker at his original grade and step, effective August 4, 1992, and the Office informed him by letter dated August 11, 1992 that his wage-loss compensation was terminated.

There is no evidence in this record that appellant's work from August 4, 1992 until August 10, 1994 was part-time, sporadic, seasonal or temporary. In fact, reports from the rehabilitation counselor and nurse practitioner assigned to appellant's case indicated that until he was subject to a reduction-in-force, appellant worked steadily at a light-duty shop during the two years while seeking intermittent treatment for "flare-ups" of his dermatitis.[9]

Appellant underwent a fitness-for-duty examination on December 30, 1992 by Dr. Glenn Neil Ledesma, a dermatology practitioner who concluded that appellant was capable of performing his usual and customary job duties, providing that his hands did not come in contact with chemicals, solvents, strong fumes, extreme heat, fiberglass or other sensitizing agents and that he wore cotton-lined gloves whenever working with these substances. Therefore, the Board finds that appellant's actual earnings from August 4, 1992 through August 10, 1994 fairly and reasonably represented his wage-earning capacity.[10]

The Board also finds that appellant failed to establish that he sustained any work-related disability after August 10, 1994.[11]

An employee seeking benefits under the 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 filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged, and that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[12] These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or occupational disease.

In an occupational disease claim such as this, a claimant must submit: (1) medical evidence establishing the existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the disease; and (3) medical evidence establishing that the employment factors

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[9] *See William D. Emory*, 47 ECAB ___ (Docket No. 93-2365, issued December 11. 1995) (finding that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity if the earnings are derived from a make-shift position designed for his or her needs).

[10] *See Monique L. Love*, 48 ECAB ___ (Docket No. 95-188, issued February 28, 1997) (finding that appellant has no loss of wage-earning capacity based on her actual earnings as a modified distribution clerk for more than 60 days inasmuch as her position was neither temporary nor makeshift).

[11] On appeal, the Director notes that the Board lacks jurisdiction over the January 8, 1996 decision issued by the Office because appellant filed his notice of appeal with the Board on November 21, 1995. Subsequently, the Board received a hand-written letter from appellant on March 19, 1996 requesting that the Board consider "the proof of injury." In the interests of administrative efficiency, the Board has reviewed both the July 26 and January 8, 1996 Office decisions on appellant's claims for disability compensation.

[12] *Daniel J. Overfield*, 42 ECAB 718, 721 (1991).

were the proximate cause of the disease or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by claimant.[13]

In determining whether an employee sustained an injury in the performance of his duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components considered in conjunction with one another.[14] The first component to be established is that the employee actually experienced the employment incident at the time, place and manner alleged. In some cases, this first component can be established by an employee's uncontroverted statement which is consistent with the surrounding facts and circumstances and his subsequent course of action.[15] The second component, whether the employment incident caused a personal injury, generally must be established by medical evidence.[16]

In this case, appellant submitted reports from Dr. Abrams in support of both his claims for a recurrence of disability and for an occupational condition. Dr. Abrams stated in his June 14, 1993 report that appellant had chronic hand dermatitis that flared when his hands contacted chemical solvents or remained in gloves and were thus subject to excessive heat and perspiration. Dr. Abrams advised avoidance of exacerbating causes.

In his June 30, 1995 report, Dr. Abrams related that appellant's most recent examination showed chronic hand dermatitis but no acute signs of inflammation. Noting his treatment of appellant since 1991, Dr. Abrams advised the avoidance of gloved labor. Finally, Dr. Abrams stated in an August 30, 1995 report that appellant's condition "was directly related to his work situation" because his acute flare-ups of his dermatitis occurred at his work site and when he was on leave, the inflammation subsided. Dr. Abrams added: "While this may be mere coincidence, I believe it is reasonable to conclude that [appellant] has an occupational contact dermatitis."

The Board finds that Dr. Abrams reports are insufficient to establish a causal relationship between the accepted work injury of irritant contact dermatitis and appellant's current condition or his condition on August 10, 1994. Initially, Dr. Abrams reported his treatment of appellant's flare-ups of dermatitis, but offered no opinion on the requisite causal relationship between the accepted work injury in 1985 and appellant's condition in 1994.

Subsequently, Dr. Abrams attributed appellant's flare-ups to his work site, but did not explain how specific work factors such as exposure to the prohibited substances caused any disability for work. Further, Dr. Abrams' generalized opinion that appellant's dermatitis is occupationally related is equivocal at best and unsupported by any medical rationale.[17] Finally, his advice to appellant to avoid certain substances at work does not constitute an opinion that he

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[13] *Jerry D. Osterman*, 46 ECAB 500, 507 (1995); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[14] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Fact of Injury*, Chapter 2.803.2a (June 1995); *see Elaine Pendleton*, 40 ECAB 1143, 1147 (1989).

[15] *Edgar L. Colley*, 34 ECAB 1691, 1695 (1983).

[16] *John J. Carlone*, 41 ECAB 354, 357 (1989).

[17] *See William S. Wright*, 45 ECAB 498, 504 (1994) (finding that physicians' statements regarding causal relationship constitute surmise and conjecture and are thus of diminished probative value).

is disabled to perform the duties of the modified position that he last held before the reduction-in-force.[18] Therefore, because appellant has failed to meet his burden of proof in establishing the existence of a compensable condition, the Board finds that the Office properly denied his claim for compensation.[19]

The January 8, 1996 and July 26 and September 13, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.
August 3, 1998

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

[18] *See William A. Kandel*, 43 ECAB 1011, 1022 (1992) (finding that a physician's warning that appellant's return to work could cause increased cardiac problems was not evidence of present disability).

[19] *See Hubert C. Burton*, 43 ECAB 612, 621 (1992) (noting that workers' compensation law does not apply to each and every injury or illness that has some connection with employment)