U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM P. NASH and DEPARTMENT OF THE NAVY, NORTH ISLAND NAVAL AIR STATION, San Diego, Calif.

Docket No. 96-1502; Submitted on the Record;
Issued August 11, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issues are: (1) whether appellant had a recurrence of disability causally related to his June 16, 1981 employment injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant could work full time and therefore had a 47 percent loss of wage-earning capacity.

On June 16, 1981 appellant, then a 27-year-old sheet metal worker, stepped off a work stand while riveting and developed back pain. Appellant received continuation of pay for the period June 17 through July 31, 1981. Appellant returned to light-duty work on August 10, 1981. He stopped working again on March 12, 1982. A March 12, 1982 computerized axial tomography (CAT) scan showed a bulging L3-4 bulging disc without disc herniation or encroachment on the nerve roots, a mild L4-5 disc herniation, slightly to the left, and mild bilateral facet hypertrophic arthropathy at L5-S1 with disc herniation. A November 16, 1982 CAT scan showed that the L4-5 disc herniation indented the dural sac and displaced both the right and left traversing L5 nerve roots. The Office accepted appellant's claim for low back strain and disc herniation.[1] The Office authorized buy back of leave for the period March 12 through March 30, 1982 and began payment of temporary total disability compensation effective March 30, 1982. On July 11, 1983 appellant underwent chemonucleolysis of L4-5 and L5-S1. On February 13, 1989 appellant underwent surgery for a spinal fusion at L4-5.

In a March 3, 1995 letter, the employing establishment offered appellant a position as a mail/file clerk. The employing establishment indicated that the job involved intermittent walking, bending, stooping, reaching, stretching, lifting and carrying of 1- to 10-pound boxes of material. In a March 10, 1995 letter, the employing establishment clarified that the job was permanent. In a March 16, 1995 letter, the Office informed appellant that it found the job offered by the employing establishment to be suitable. On April 14, 1995 appellant accepted the

[1] Although the CAT scan indicated that appellant had a disc herniation at L4-5, the Office accepted the claim as a disc herniation at L5-S1.

position. In an October 11, 1995 letter, the Office indicated that the employing establishment had confirmed that the position remained open to appellant and again stated that the position was found to be suitable for him. The Office noted that it had previously determined that the job offered for four hours a day was suitable. It stated that the employing establishment was able to offer the job on a full-time basis. The Office concluded that the full-time position was also suitable for him. Appellant returned to work at the offered position on October 16, 1995, working four hours a day. The Office began payment of compensation for 73 percent loss of wage-earning capacity, based on appellant's actual earnings as of October 16, 1995. Appellant began working full time on November 6, 1995. The Office concluded that appellant had a 47 percent loss of wage-earning capacity effective November 6, 1995.

On November 6, 1995 appellant filed a claim for recurrence of disability. He indicated that his personal physician placed him on 4 hours a day then subsequently modified his work restriction to 6 hours a day with a lifting restriction of 25 pounds. He related that on November 2, 1995 his physician increased his work limitations to 8 hours a day with a 20-pound lifting restriction. He contended that the increase of working hours from four to eight hours a day had exacerbated his low back pain and would continue to exacerbate his back pain.

In a January 8, 1996 decision, the Office rejected appellant's claim for a recurrence of disability on the grounds that the evidence of record established that appellant was capable of working eight hours a day and therefore had not suffered a recurrence of his back condition. In a January 9, 1996 decision, the Office found that the position of mail/file clerk fairly and reasonably represented appellant's wage-earning capacity and therefore reduced his compensation, effective November 6, 1995 to reflect a 47 percent loss of wage-earning capacity.

The Board finds that the Office properly determined that appellant had a 47 percent loss of wage-earning capacity.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of compensation benefits. Once the medical evidence suggests that a claimant is no longer totally disabled but rather is partially disabled, the issue of wage-earning capacity arises.[2] Section 8115(a)[3] of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by his actual earnings if the actual earnings fairly and reasonably represent her wage-earning capacity. The Board has stated that, generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of such evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.[4]

The Office referred appellant to Dr. Paul C. Millings, a Board-certified orthopedic surgeon, for an examination and second opinion. In a June 8, 1994 report, Dr. Millings stated

[2] *Garry Don Young*, 45 ECAB 621 (1994).

[3] 5 U.S.C. § 8115(a).

[4] *Floyd A. Gervais*, 40 ECAB 1045 (1989); *Clyde Price*, 32 ECAB 1932 (1981).

that appellant had a mildly positive electromyogram (EMG) for mild S1 radiculopathy and was post-surgical for laminectomy and discectomy, L4-5, with fusion. He noted that appellant's current muscle tone and general physical condition was excellent. He indicated that there was no evidence of loss of physical mobility. He stated that the objective findings did not support appellant's subjective complaints. He indicated that appellant could work 8 hours a day with no repetitive bending or lifting over 25 pounds.

The Office sent a copy of Dr. Millings' report to Dr. Edward Kreusser, a Board-certified orthopedic surgeon appellant's personal physician and requested his evaluation of appellant's work restrictions. In an August 9, 1994 report, Dr. Kreusser stated that appellant should limit bending, stooping, kneeling and lifting and was restricted to no lifting over 25 pounds. He concluded that appellant could work four hours a day with these restrictions. The Office requested clarification from Dr. Kreusser, indicating that, if he disagreed with the work restrictions presented by Dr. Millings, he should explicitly state so and give specific reasons for such disagreement, citing specific objective evidence in his reports that supported his conclusion. In a November 7, 1994 report, Dr. Kreusser stated that he had reviewed Dr. Millings' report and was essentially in complete agreements with Dr. Millings' conclusions. He indicated that his work restrictions report would be changed so that appellant could work a continuous eight-hour day.

In a November 2, 1995 note, Dr. Kreusser stated that appellant was released to work 8 hours a day with no lifting or carrying over 20 pounds, no repetitive bending, and freedom to alternate his positions for comfort. In a November 8, 1995 report, Dr. Kreusser stated that appellant presented that day with increased complaints of low back pain with bilateral leg pain and numbness associated with his increased work load of four hours a day. He concluded that appellant should work only four hours a day. In a November 29, 1995 report, Dr. Kreusser stated that appellant continued over the years to have a debilitating degree of pain in his low back, referred down his legs, aggravated with prolonged standing and sitting. He presumed that the symptoms were due to aggravation of adjacent disc spaces and possibly due to scar tissue on existing nerve roots from the level of the operation on the spine. Dr. Kreusser commented that the recommendation to hold appellant to four hours of work as opposed to increasing to eight derived directly from appellant's insistence that he was not able to symptomatically tolerate additional work time beyond four hours. He indicated that it was common for post-surgical low back patients to have a definite intolerance for prolonged standing and sitting. Dr. Kreusser noted that appellant's complaints had been consistent over the years. He commented that it was likely the four hours a day limitation was permanent but added that after possibly six months a very slow increase in work of perhaps one hour a work day per month to accommodate appellant to the increased time before contemplating additional increases. Dr. Kreusser stated that appellant had not suffered any new injury as a consequence of the increase of working hours from four to eight hours. He indicated, however, that the additional time provided an influence which increased appellant's symptoms. Dr. Kreusser advised that backing down to four hours should leave appellant at the same symptomatic level which he would be able to tolerate.

The medical evidence therefore shows that Dr. Millings concluded that appellant could work eight hours a day at a light-duty position within certain restrictions. Dr. Kreusser has given conflicting statements on whether appellant could work eight hours a day. In his November 2,

1995 statement, he released appellant to work eight hours a day. Just six days later, Dr. Kreusser reversed himself and stated that appellant could only work four hours a day. In his November 29, 1995 report, Dr. Kreusser indicated that appellant reported he had an increase in pain when working eight hours a day. Dr. Kreusser cited only appellant's complaints in support of his statement that appellant's work hours should be reduced. He did not present any rationalized explanation on how the increase in work hours would cause increased pain such that appellant would be unable to work eight hours a day. The job of mail/file clerk that appellant accepted is within the physical restrictions specified by Dr. Millings and by Dr. Kreusser. The Office met its burden of proof in establishing that appellant was no longer totally disabled and that the position of mail/file clerk fairly and reasonably represented appellant's wage-earning capacity. Appellant has not submitted any rationalized medical evidence that shows he is unable to perform the duties of a mail/file clerk full time. The Office, therefore, properly based its loss of wage-earning capacity determination on appellant's actual earnings in a full-time position.

The Board further finds that appellant has not met his burden of proof in establishing that he had a recurrence of disability.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which he seeks compensation was causally related to his employment injury. As part of such burden of proof, rationalized medical evidence showing causal relationship must be submitted.[5] As discussed previously, Dr. Kreusser stated that increased work hours caused appellant to have increased pain but only cited appellant's complaints as the source of his conclusion on causal relationship. Dr. Kreusser has not presented any rationalized medical evidence to explain how appellant had a recurrence of disability because of the increased work hours. Appellant therefore has not met his burden of proof.[6]

[5] *Dominic M. DeScala*, 37 ECAB 369 (1986).

[6] On appeal, appellant submitted additional evidence including medical reports not previously submitted. The Board can only consider the evidence that was before the Office at the time of the Office's final decision. 20 C.F.R. § 501.2. The Board therefore cannot consider new evidence on appeal.

The decisions of the Office of Workers' Compensation Programs, dated January 9 and January 8, 1996, are hereby affirmed.

Dated, Washington, D.C.
August 11, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member