U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT M. MURPHY and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Grand Rapids, Mich.

Docket No. 97-400; Submitted on the Record;
Issued December 14, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity as a result of his March 23, 1994 employment injury.

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision.

On March 23, 1994 appellant, then a maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on that date he fell off a dock cutting the stump of his amputated right leg and injuring his lower back. Appellant stopped work intermittently from the date of the injury until he returned to work on August 28, 1995 after accepting the employing establishment's offer of a modified custodian position.[1]

On July 13, 1994 the Office accepted appellant's claim for contusion of the low back and abrasion of the right leg.

On August 10, 1994 appellant filed a claim (Form CA-2a) alleging that he sustained a recurrence of disability beginning July 20, 1994. By decision dated October 14, 1994, the Office found the evidence of record insufficient to establish that the claimed condition/disability was caused by the March 23, 1994 employment injury. On July 14, 1995 the Office modified the acceptance of appellant's claim to include aggravation of spondylolisthesis at L5-S1.

On October 16, 1995 appellant filed a Form CA-2a alleging that he had sustained a recurrence of disability beginning December 8, 1994. Appellant filed another Form CA-2a on

[1] Appellant retired on disability from the employing establishment effective February 3, 1996 and received retirement benefits from the Office of Personnel Management.

November 27, 1995 alleging that he had sustained a recurrence of disability commencing May 8, 1995.

By decision dated January 25, 1996, the Office found the evidence of record insufficient to establish that the claimed December 8, 1994 recurrence of disability was caused by the March 23, 1994 employment injury. In a January 28, 1996 letter, appellant requested an oral hearing. By decision dated February 1, 1996, the Office vacated the January 25, 1996 decision and accepted that appellant sustained a recurrence of disability on December 8, 1994 and May 8, 1995 that was causally related to the March 23, 1994 employment injury.

By decision dated September 28, 1996, the Office found that appellant had no loss of wage-earning capacity as a result of his March 23, 1994 employment injury. The Office stated that appellant had returned to work in a modified maintenance position on August 28, 1995. The Office further stated that since appellant had returned to work at a "saved pay rate," his wages were equal to the current grade and step of his date-of-injury position as a maintenance worker. Additionally, the Office stated that the modified maintenance worker position fairly and reasonably represented appellant's wage-earning capacity. The Office noted that appellant elected to retire effective February 3, 1996 and that he did not wish to receive further benefits.[2]

Section 8106(a) of the Federal Employees' Compensation Act provides for payment of loss of wage-earning capacity, as follows:

> "If the disability is partial, the Unites States shall pay the employee during the disability monthly monetary compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability which is known as his basic compensation for partial disability."[3]

Regulations construing the Act further provide that "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 loss of wage-earning capacity."[4]

To determine a loss of wage-earning capacity of an employee, the Office divides the amount of earnings an injured employee currently receives by the current earnings of his or her date-of-injury position. The applicable regulation governing the Office provides that "[t]he comparison of earnings and 'current' pay rate for the job held at the time of injury need not be made as of the beginning of partial disability."[5] The regulation provides that "*[a]ny convenient*

[2] In a June 20, 1996 report, Susan Buszek, appellant's Office nurse, advised the Office that appellant no longer worked at the employing establishment and no longer wanted treatment.

[3] 5 U.S.C. § 8106(a).

[4] 20 C.F.R. § 10.303.

[5] 20 C.F.R. § 10.303(b).

date may be chosen by the Office for making the comparison as long as the two wage rates are in effect on the date used for the comparison."[6] (Emphasis added.)

In this case, on September 28, 1996, the Office found that appellant had no loss of wage-earning capacity because he returned to work on August 28, 1995 in a light-duty custodial position at retained pay. On the date of injury, appellant worked as a laborer/custodian at a level 3 pay rate. Appellant stated in letters dated December 3, 1995 and January 9, 1996 that he had accepted the employing establishment's offer to work in a light-duty custodial position, that he returned to work in this position on August 28, 1995, and that he had been working in the position ever since. However, there is insufficient evidence of record to establish that appellant returned to work in the light-duty custodial position at retained pay. The record contains a September 23, 1996 report of a telephone call on that date between the Office and Lois Duke, an employing establishment employee, in which the Office requested that the job offer made to appellant on August 25, 1995 be submitted. The Office also requested pay rate information. Additionally, the Office telephoned Ms. Duke to obtain loss of wage-earning capacity information. While the Office stated in its September 28, 1996 decision that appellant had returned to work in a modified maintenance position at a "saved pay rate," it does not appear from the record that the employing establishment ever submitted the requested information to the Office.

Accordingly, the case will be remanded to the Office for further development. On remand, the Office should provide the rate of pay that appellant received when he returned to work in the position of modified maintenance worker on August 28, 1995. Following this and any other such development which the Office deems necessary, the Office shall issue a *de novo* decision on the issue of whether appellant had any loss of wage-earning capacity as a result of his March 23, 1994 employment injury.

[6] *Id.*

The decision of the Office of Workers' Compensation Programs dated September 28, 1996 is hereby set aside and the case is remanded to the Office for further development in accordance with this decision of the Board.

Dated, Washington, D.C.
December 14, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member