U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALDINE HARRIS and DEPARTMENT OF THE NAVY, NORFOLK NAVAL SHIPYARD, Norfolk, Va.

Docket No. 95-2480; Submitted on the Record;
Issued January 26, 1998

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issues are: (1) whether appellant's disability from May 29 through November 3, 1987 was causally related to her August 11, 1986 employment injury; and (2) whether the Office of Workers' Compensation Programs properly determined that appellant had a 47 percent loss of wage-earning capacity.

The case has been on appeal previously.[1] In a September 6, 1994 decision, the Board noted that the issue was whether appellant had met her burden of proof in establishing that her disability from May 29 through November 3, 1987 and from November 10, 1987 through January 19, 1988 was causally related to her August 11, 1986 employment injury when she slipped on a rug at the employing establishment and fell. The Office had indicated that appellant's treating physician, Dr. James P. Devereux, a Board-certified orthopedic surgeon, in a March 16, 1987 report had released appellant to full duty and had subsequently referred her to Dr. J. Abbott Byrd, a Board-certified orthopedic surgeon, for a second opinion on whether appellant required surgery. The Office concluded that the medical evidence from Dr. Byrd showed that appellant was disabled for work due to the effects of the employment injury effective January 21, 1988. The Board found that Dr. Byrd's opinion was based on a CAT (computerized axial tomography) scan which showed spondylolysis and spondylolisthesis at L5-S1 which was causing compression of the L5 nerve root. The Board therefore concluded that the medical evidence of record established that appellant's disability from November 10, 1987 through January 20, 1988 was causally related to the employment injury. The Board further noted that Dr. Byrd, Dr. Devereux and Dr. Norman H. Horowitz, a Board-certified neurosurgeon, had all related appellant's current condition to her fall at work on August 11, 1986 but had not specifically addressed whether appellant was totally disabled for the period May 29 to November 3, 1987. The Board concluded that the opinions of these physicians were sufficient

[1] Docket No. 93-1695 (issued September 6, 1994).

to require further development of this issue and therefore remanded the case for such further development.

In an April 12, 1995 decision, the Office found that appellant had a 47 percent loss of wage-earning capacity effective October 21, 1990 based on her actual part-time position as a secretary for the period October 9, 1989 through December 10, 1990. The Office noted that appellant would have been able to continue working at that position if state funding for the position had not been eliminated. In an April 26, 1995 decision, the Office rejected appellant's claim for compensation for the period May 29 through November 3, 1987 on the grounds that the evidence of record failed to demonstrate that the accepted injury caused disability for such period.

The Board finds that the case is not in posture for decision on the issue of whether appellant has any disability for the period May 29 through November 3, 1987.

After the Board remanded the case for further development, the Office referred appellant, together with the statement of accepted facts and the case record, to Dr. David E. Lannik, a Board-certified orthopedic surgeon specializing in hand surgery, for a second opinion. Dr. Lannik was requested to address the issue of whether appellant was totally disabled for the period May 29 through November 3, 1987 due to the employment injury. In his February 7, 1995 report, Dr. Lannik extensively reviewed appellant's medical history. He diagnosed chronic cervical spine sprain and post-traumatic lumbar spondylolisthesis. Dr. Lannik indicated that no impairment could be assigned to appellant based on objective clinical evidence of the cervical spine. He stated that appellant could perform only in a light to medium work activity level. Dr. Lannik indicated that appellant could sit without limits, walk up to two hours a day, lifting up to one hour a day, stand up to four hours a day with no repeated bending, squatting, climbing, kneeling or twisting. He did not specifically address the issue he was asked to address, whether appellant was disabled for the period May 29 through November 3, 1987. The Office, in a memorandum accompanying the April 26, 1995 decision, indicated that Dr. Lannik noted Dr. Devereux had released appellant for full duty on March 13, 1987 and cited that finding as its basis for the denial of appellant's claim for the period in question. However, the Board, in its decision, noted that Dr. Devereux had released appellant for duty as noted by Dr. Lannik but had subsequently stated that appellant had been disabled for work since the August 11, 1986 employment injury. The evidence that appellant had been released for work had been considered by the Board when it ordered that, based on the reports of Dr. Devereux, Dr. Byrd and Dr. Horowitz, the case be remanded for further development. As Dr. Lannik did not directly address the issue of appellant's disability for the period May 29 through November 3, 1987 even though he was asked to address the issue, his report cannot be used to support a decision to deny compensation for that period. The case will therefore be remanded for proper development of the record as previously directed by the Board. The Office should prepare a complete statement of accepted facts and refer appellant, together with the statement of accepted facts and the case record, to an appropriate specialist for a specific rationalized opinion on whether appellant's disability for the period May 29 to November 3, 1987 was causally related to the employment injury. After further development as it may find necessary the Office should issue a *de novo* decision on this issue.

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

Section 8115(a)[2] of the Federal Employees' Compensation Act provides that the wage-earning capacity of an employee is determined by her 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.[3]

Appellant worked part time, 20 hours a week, as a secretary until her hours were reduced and then eliminated due to reduction in state funding. The Office, under its procedures, can make a retroactive determination of wage-earning capacity if a claimant has sustained employment at a position for a specific period of time.[4] As appellant held her part-time position for over a year, she established that she had a wage-earning capacity based on the actual wages she received during the period. Her pay at that position was $6.03 an hour or $120.60 a week. The Office compared her pay at that position with the pay of her former position, taken as of the time appellant was working in her part-time position as a secretary, which was $257.06 a week. The Office determined that appellant's pay in the part-time position was 47 percent of the pay of her former federal position as clerk-typist. It then multiplied that percentage by her pay rate at the time when her compensable disability recurred as of January 22, 1988, which was $249.60 a week. The Office's calculations were accurately and properly performed under the *Shadrick* formula.[5] The Office therefore properly determined appellant's loss of wage-earning capacity.

[2] 5 U.S.C. § 8115(a).

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

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (December 1993).

[5] *See Albert C. Shadrick*, 5 ECAB 378 (1953).

The decision of the Office of Workers' Compensation Programs, dated April 12, 1995, is hereby affirmed. The decision of the Office, dated April 26, 1995, is hereby set aside and the case remanded for further action in accordance with this decision.

Dated, Washington, D.C.
January 26, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member