U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTINE A. VEGAS-OREGON and U.S. POSTAL SERVICE, POST OFFICE, Cut Off, La.

Docket No. 96-1621; Submitted on the Record;
Issued May 5, 1998

DECISION and ORDER

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

The issues are: (1) whether appellant is entitled to compensation for a loss in wage-earning capacity between March 4, 1991 and October 22, 1993; and (2) whether appellant has met her burden of proof to establish a recurrence of total disability commencing October 22, 1993 due to her accepted employment-related condition.

On March 27, 1990 appellant, then a 37-year-old auxiliary letter carrier who performed relief work for two or three routes on a part-time basis, sustained multiple injuries in a motor vehicle accident while delivering mail. Appellant stopped work on the date of injury. Under the care of Dr. Richard M. Landry, a Board-certified orthopedic surgeon, appellant underwent diagnostic testing which revealed preexisting degenerative disc disease of the cervical spine, cervical spondylosis, and a disc protrusion at C6-7 which Dr. Landry interpreted as a herniation. Appellant came under the care of Dr. A. Delmar Walker, a Board-certified orthopedic surgeon, who recommended a cervical myelogram with a post-myelogram computerized tomography scan to evaluate the extent of the protrusion and whether it was part of the underlying condition. Following diagnostic studies on May 1, 1990, Dr. Walker performed an anterior cervical fusion and discectomy at C6 on June 19, 1990.

The Office of Workers' Compensation Programs accepted appellant's claim for multiple contusions, back strains and cervical strain. For an opinion on causal relationship between the accident and the herniated disc, the Office referred appellant to Dr. Charles M. Wilson, a Board-certified orthopedic surgeon. Dr. Wilson related the aggravation of appellant's underlying cervical condition to the employment-related accident, but felt the surgery was not warranted. The Office referred appellant to Dr. A. Robert Steiner, a Board-certified orthopedic surgeon, who felt that appellant had not sustained an employment-related aggravation and that appellant could return to work for 4 hours per day with intermittent breaks and a 10- to 20-pound lifting restriction. By decision dated October 26, 1990, the Office denied payment of the surgery on the grounds that Dr. Steiner did not find appellant had sustained an employment-related aggravation.

Appellant continued under the care of Dr. Walker, who reported appellant's complaints of paresthesias of the right arm and upon obtaining a full neurological work-up, related the symptoms to scar tissue from the surgery and a possible lumbar disc condition. In a December 21, 1990 report, Dr. Walker released appellant to work with a lifting restriction of between 30 and 40 pounds, and limited above the shoulder activity. He noted in a subsequent February 11, 1991 report, that appellant continued to obtain treatment from her family practitioner for her thoracic and lumbar spine condition. Dr. Walker related the condition to an aggravation of the preexisting disease due to the employment-related injury.

Appellant was offered a limited-duty position with the duties of answering telephones, boxing mail, casing mail, and any other duties within her 20-pound lifting restriction and requirement to have breaks in between her activities which she could perform up to 4 hours per day. Prior to the offer, the postmaster had agreed to allow appellant to work up to 23 hours per week, but the offer reduced the number of permitted hours to 18 per week between the hours of 7:00 a.m. and 10:00 a.m. in a 6-day period. Appellant noted that she would discuss any problems with casing above the shoulder with the postmaster if the need arose. She returned to work for a scheduled tour of up to three hours per day on March 4, 1991.

Appellant requested wage-loss compensation for the period between June 19, 1990 and her return to work on March 3, 1991, as well as the difference in pay beginning March 4, 1991, from the 23 maximum hours initially agreed upon and the 2 to 3 hours per day she worked. The injury compensation specialist indicated by letter dated September 23, 1992, that in her prior position as an auxiliary letter carrier, she had been guaranteed a minimum of 8 hours of work per week for delivery of the one main route to which she was assigned.

In October 1991 appellant came under the care of Dr. Christropher E. Cenac, a Board-certified orthopedic surgeon, who ordered nerve conduction studies which were reported as normal. He limited appellant from performing any lifting activities in a November 1991 treatment note.

By decision dated November 10, 1992, the Office denied appellant's claim for wage-loss compensation between June 19, 1990 and March 3, 1992. Appellant requested a hearing, and submitted a copy of a deposition taken of Dr. Walker on July 2, 1991. She also submitted a June 1992 report from Dr. Cenac who noted evaluations in March, May and June 1992, and opined appellant had sustained a 15 percent impairment due to the cervical injury and surgery, as well as a 5 to 10 percent impairment due to low back and chronic radicular symptoms. Dr. Cenac stated that appellant was under permanent restrictions of repetitive bending, stooping, squatting, twisting, kneeling, bending, prolonged sitting or standing, and repetitive lifting of weights greater than 15 pounds. He noted that appellant was permanently disabled from jobs involving manual dexterity, such as typing or stenographic work. In addition she submitted payroll information documenting her hours, and two separate lists she compiled which showed that she worked an average of 16.38 hours per week after the injury in 1991 and 14.8 hours per week in 1992. She also submitted documentation pertaining to a grievance she filed against her supervisor for failing to allow her to leave work when she was in pain, and against the postmaster for failing to allow her to work up to 23 hours.

A hearing was scheduled for September 21, 1993. Prior to the hearing, appellant submitted additional reports from Dr. Cenac, who recommended one week off from work in March 1993. Appellant noted that she only took one day off at that time. In June 1991 Dr. Cenac noted appellant's continued complaints of symptoms on a limited-work activity schedule. He recommended on June 30, 1993 that appellant be considered a candidate for a functional capacity evaluation to determine her physical capabilities. Appellant also filed a claim for total disability for intermittent days due to continued back and neck symptoms. She noted that in October 1991 Dr. Walker encouraged her to take off work for six weeks, but she felt she had to continue to work. She noted that her job duties required her to bend, stoop, lift, and squat, which were activities she was not supposed to be doing, and that she felt she could not continue to work for two to three hours per day.

At the hearing, appellant testified she was not provided with ample work and that she was unable to completely perform her work because of her condition. She contended that the hours per week she worked before her injury, and the current 10 to 12 hours per week she worked, represented a loss of wage-earning capacity. Appellant testified that while her doctor did not specifically state she was only allowed to work 10 to 12 hours per week, he felt she should stop working if she continued to have problems working. Appellant submitted a September 14, 1993 report from Dr. Walker regarding his past treatment and restating his opinion that the surgery performed in 1990 was necessitated by the employment-related injury. Appellant also submitted a statement detailing the time she worked two separate routes between 1984 and 1990 prior to her injury, in addition to providing occasional relief for the Golden Meadows route. She noted, for example, that in 1989 she delivered mail 69 times on Route 4, 32 times on Route 5, and 13 times on the route associated with the Golden Meadows office.

Subsequent to the hearing, the employing establishment stated that, prior to her injury, appellant had been expected to deliver mail for Route 4 on an every other week basis, and that she performed supplemental work with the Golden Meadow Office as well as performing carrier services for Route 5. The employing establishment noted that between Routes 4 and 5 appellant performed 12 hours of delivery duties per week, and that appellant was permitted to work up to 18 hours in her current limited-duty position. The employing establishment enclosed a print-out of earnings between August 1989 and July 1990, which corresponded to an average of 16.25 hours per week.[1]

Appellant stopped work on October 21, 1993, and filed a claim for a recurrence of total disability on that date. She indicated that both Drs. Walker and Cenac stated that she could not "handle" the limited-duty job, and that she was unable to support her family on the limited hours she could work. Appellant identified the radicular symptoms in her leg and foot as the primary source of discomfort.

In a November 30, 1993 report, Dr. Cenac stated that he evaluated appellant on October 21, 1993 and encouraged her to obtain a functional capacity evaluation. He stated that

[1] In response appellant objected to the calculations by the employing establishment, noting that her injury was in March 1990 which was included in the time period calculated by the employing establishment and that the earnings were based on items such as a jeep allotment, as opposed to straight salary.

he felt she had magnified her symptoms and noted awareness of eyewitness accounts of her activities in town on dates she left work early. Dr. Cenac denied that he told appellant to stop work. He attached the results of a functional capacity evaluation performed on November 9, 1993, which indicated that appellant could perform limited lifting and that she was able to perform sedentary work. The evaluation showed that appellant could lift up to 15 pounds for 30 feet, but the physical therapist recommended a 10-pound lifting restriction, the same lifting restriction recommended by Dr. Cenac. Dr. Cenac noted on his report, that the work restrictions were consistent with those he previously provided.

By decision dated December 1, 1993, the Office hearing representative found that, with respect to the claimed total disability for the period June 20, 1990 until March 3, 1991, there was sufficient grounds for further development of the medical evidence. The Office hearing representative noted that Dr. Steiner's report did not establish that appellant suffered from continued residuals of the employment injury. The Office hearing representative found, with respect to the claimed difference in wage-earning capacity after March 4, 1991, that the record required further development as well. The Office hearing representative indicated that based on the employing establishment's documentation, he accepted 16.25 hours as the average number of hours appellant worked per week prior to her injury and required further documentation on the average number of hours worked after the injury.

In a December 13, 1993 statement, the senior injury compensation specialist stated that for 32 weeks in 1991, appellant's work hours averaged 16.07 hours per week. She submitted salary records which indicated that for a two-year period between the fall of 1991 and the fall of 1993 when she stopped work, appellant worked an average of 15.11 hours.

Dr. George Carey, a Board-certified orthopedic surgeon to whom the Office referred appellant, opined that appellant sustained an aggravation of her underlying degenerative disc disease necessitating surgery at C6-7 and he recommended a fusion at C5-6. He stated that appellant could return to a full-time light-duty job with a 20-pound lifting restriction and breaks in her sitting, walking and standing.

The Office amended the acceptance of appellant's claim to include aggravation of preexisting degenerative disc disease, and advised appellant that the surplus of the third-party payment from her insurance company was required to be absorbed prior to paying additional benefits.

Appellant objected to the calculation of the average number of hours she worked between the fall of 1991 and 1993, stating that some weeks she worked 14 hours per week, others she worked 12 hours per week, and that these weeks were well below the 21-hour amount allotted to her for continuation of pay. In June 1994 the employing establishment provided a day-to-day list of hours worked between March 4, 1991 and October 22, 1993, which confirmed appellant's

statements that her hours decreased over the years from a little over 13 hours per week in 1991 to 12 hours per week in 1992, and further to a little over 10 hours in 1993.[2]

In July 1994 appellant obtained diagnostic studies of her back under the continued treatment of Dr. Cenac. Dr. Cenac released appellant back to work in a sedentary position, but noted in a work restriction evaluation dated September 7, 1994, that appellant could perform intermittent lifting or carrying 8 hours per day with a 10-pound lifting restriction, and 4 hours per day up to 20 pounds. He noted that appellant could stand for three hours per day intermittently and could sit for up to five hours per day, both on an intermittent basis.

By decision dated June 17, 1994, the Office denied appellant's claim for a recurrence of total disability on and after October 22, 1993.

In a letter requesting a hearing, appellant alleged that she had a seizure at work on October 21, 1993, and that Dr. Cenac recommended she not return to work until she underwent a functional capacity evaluation test.

The Office issued a November 22, 1994 decision which found that appellant had no loss of wage-earning capacity. The Office found that since appellant's wages of $11.38 remained the same in her limited-duty position commencing March 4, 1991, and she worked more hours after her injury than prior to her injury, she sustained no loss of wage-earning capacity.[3]

By letter dated November 28, 1994, appellant requested reconsideration of the November 22, 1994 decision. After speaking with an Office representative on December 27, 1994, she requested an oral hearing, which the Office denied by decision dated January 13, 1995 based on the lack of a timely request.

By decision dated August 9, 1995, the Office denied a review of the merits of appellant's claim.[4] Appellant requested reconsideration and in addition to contending that the calculations of the Office were incorrect, she contended that the employing establishment did not have any positions available within her restrictions.

By decision dated October 25, 1995, the Office found that appellant had not sustained a loss of wage-earning capacity. The Office found that the pay stubs submitted by appellant showed that she averaged 14.6 hours per week from March 4, 1991 until October 2, 1993. The Office found, however, that the prior calculation of 22 hours a week was correct, in that it was

[2] Based on a 5-day work week schedule, the list of hours indicated that appellant worked an average of 2.65 hours per day, or 13.25 hours per week, between March 4 and December 1, 1991. She worked an average of 2.43 hours per day, or 12.1 hours per week, for the year 1992. Appellant worked an average of 2.03 hours per day, or 10.15 hours per week, for the period January 1 to October 22, 1993.

[3] The Office calculated an average of 22 hours per week for the period March 4, 1991 until March 4, 1992, which was above the 16.25 hours per week it had determined appellant worked.

[4] The Office found that the prior calculation of hours worked were properly based on the day-to-day listing of hours provided by the employing establishment. The Office did not recalculate the number of hours or compare the information with the pay stubs provided by appellant, which were previously of record.

based on the records provided by the employing establishment, and that the employing establishment explained that work for 3 hours per day for 6 days a week was available to appellant.

Appellant requested reconsideration and submitted a copy of the work restrictions provided in September 1994 by Dr. Cenac, and a copy of an October 1994 letter from the employing establishment indicating a lack of available light-duty jobs within the work restrictions.

By decision dated January 17, 1996, the Office denied modification of its prior decisions, finding that appellant had not established total disability commencing on October 22, 1993 due to her employment injury. The Office found that an October 1994 letter from the employing establishment on the lack of available light-duty jobs, had no bearing on her ability to perform the light-duty job as of October 22, 1993 when she stopped work.

Appellant requested reconsideration and reiterated her position that she was unable to work, as documented by the medical reports indicating that "total disability was sustained" and her inability to be employed at the employing establishment. She also submitted current reports from Dr. Cenac, who noted that appellant could perform sedentary work with no heavy lifting. Following an initial February 29, 1996 decision, by which the Office denied reconsideration of appellant's claim, the Office in a March 29, 1996 decision reviewed the merits of appellant's claim and denied modification of its prior decisions.

The Board finds that appellant is not entitled to wage-loss compensation for a loss in wage-earning capacity between March 4, 1991 and October 22, 1993.

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, "the wage-earning capacity of an employee is determined by his actual earnings if his earnings fairly and reasonably represent his wage-earning capacity."[5] Wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's capacity, must be accepted as such measure.[6]

[5] 5 U.S.C. § 8115(a).

[6] *Gregory A. Compton*, 45 ECAB 154 (1993) (where appellant had actual earnings as a data entry clerk for over a year at a wage rate substantially equal to or greater than the position held at the time of injury, the Office properly determined that he had no loss of wage-earning capacity); *James D. Champlain*, 44 ECAB 438 (1993) (where appellant's earnings as a clerk for over two years represented his wage-earning capacity, despite his work stoppage on account of a nonemployment-related myocardial infarction).

The Board has held that actual earnings do not fairly and reasonably represent a claimant's wage-earning capacity where the actual earnings are derived from a make-shift position designed for appellant's particular needs.[7] Office procedures specifically direct a claims examiner to consider factors such as part-time, sporadic, seasonal, or temporary work, when determining whether the position fairly and reasonably represents a claimant's wage-earning capacity.[8]

In the instant case, appellant sustained multiple injuries in a motor vehicle accident, while delivering mail in her capacity as an auxiliary letter carrier. Appellant contended that since she received continuation of pay based on 21 hours per week, she was entitled to pay for at least 21 hours of work per week, and felt that as her hours upon her return to light duty had been decreased to a maximum amount of 18 hours per week she was entitled to compensation for a loss of wage-earning capacity. She argued that her physical inability to perform the maximum 18 hours a week also supported her request for wage-loss compensation. The Board finds, however, that the record does not support her claim that she worked 21 hours per week prior to the March 27, 1990 employment injury, nor does the record include medical documentation that establishes her physical inability to perform the 18 hours of work she was permitted to work each week.

With respect to the actual hours worked by appellant, the record shows that appellant was an auxiliary letter carrier prior to her March 27, 1990 employment injury and in that capacity her work scheduled fluctuated. The information she provided on the routes she performed in 1989 indicate that if the routes took her a full 8 hours, she would have worked almost 18 hours a week that year. The information provided by the employing establishment, which was derived from salary information, indicates that she worked an average of 16.25 hours per week between August 1989 and July 1990, which included a 3-month period when appellant was off work. While the Office adopted the 16.25 hours per week as a correct assessment of the hours she worked prior to her injury, the record supports the fact that her hours varied and that she worked part time between 16 and 18 hours per week.

Appellant returned to work on March 4, 1991 under the work restrictions provided by Dr. Steiner, a Board-certified orthopedic surgeon and Office referral physician, who indicated

---

[7] *William D. Emory*, 47 ECAB _____ (Docket No. 94-881, issued February 14, 1996) (where the Board found that baby-sitting of a grandfather who lived in a separate apartment in the home was a make-shift position designed for appellant's particular needs); *Michael A. Wittman*, 43 ECAB 800 (1992) (where the Board found that the evidence did not support a finding that a position with the National Guard fairly and reasonably represented the claimant's wage-earning capacity, based on the fact that appellant only performed limited duties and did not appear every month as normally required); *Elizabeth E. Campbell*, 37 ECAB 224 (1985) (where the Board found that the evidence did not support a finding that the position of "baseball cover sorter" fairly and reasonably represented the claimant's wage-earning capacity, based on the seasonal nature of the job, combined with limitations presented in the reemployment efforts, and the possible make-shift nature of the job in accommodating appellant's physical condition).

[8] The Office procedures indicate that a determination regarding whether actual wages fairly and reasonably represent wage-earning capacity should be made after a claimant has been working in a given position for more than 60 days. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7a (December 1993).

that she could work a 4-hour day with a 10- to 20-pound-lifting restriction. Appellant's physician, Dr. Walker, a Board-certified orthopedic surgeon, had recommended prior to her return to work, a 30- to 40-pound lifting restriction and limited work above the shoulder. Accordingly, the evidence indicated that appellant was able to perform the limited-duty job which she began on March 4, 1991, which consisted of some casing of mail up to 20 pounds, and answering the telephone. The Board finds that the records submitted by the employing establishment indicate that appellant worked an average of 13.25 hours per week for the remainder of 1991, but that her hours decreased to 12 hours per week in 1992 and to 10 hours per week in 1993, prior to the date she stopped work. While appellant maintained that she sustained a loss of wage-earning capacity throughout the 2½-year period when she worked, the Board notes that the records from the employing establishment support the fact that 18 hours per week remained available to appellant to work, and that while she continued to obtain treatment, none of her physicians found her disabled from performing the limited-duty job activities. Since her actual earnings fluctuated before the injury and after the injury, the Office properly averaged the number of hours worked by appellant during these periods to find that she sustained no loss of wage-earning capacity.[9] Based on the calculations of 14.6 hours per week for the entire 2½-year period derived from the leave slips provided by appellant, and the Board's calculation of the decreased hours from 1991 until 1993, the Board finds that the Office's prior calculations of 22 hours per week from March 4, 1991 until October 22, 1993 appears incorrect. Nonetheless, the Board finds that while appellant's hours decreased from March 4, 1991 until October 22, 1993, the record establishes that she was afforded the full period of time to work, and that this period of time reflected a greater work period than prior to the injury. The Board finds that appellant has not demonstrated entitlement to a loss of wage-earning capacity, since she has not submitted any evidence to show her inability to earn the same wages after the injury as before.

The Board finds that appellant has not met her burden of proof to establish a recurrence of total disability commencing October 22, 1993 due to her accepted employment-related condition.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. 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.[10] The Board notes that the term "disability" as used in the Act, means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[11] Disability is thus not

[9] *Id*., Chapter 2.814.7d4 (December 1993).

[10] *Terry R. Hedman*, 38 ECAB 222 (1986).

[11] *Patricia A. Keller*, 45 ECAB 278 (1993); *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(17).

synonymous with physical impairment which may or may not result in an incapacity to earn wages.[12]

While appellant indicated that both Drs. Walker and Cenac felt appellant was having difficulty continuing to work her limited-duty assignment, the reports from these physicians do not address the duties appellant performed or why she was unable to perform the duties. Dr. Walker had, in fact, released appellant to work with a 30- to 40-pound lifting restriction, and restrictions on overhead work. While she submitted a September 14, 1993 report from Dr. Walker, he did not indicate that appellant was unable to continue to work her limited-duty job in this report, but only addressed the prior need for surgery as employment related. In his November 30, 1993 report, Dr. Cenac stated that he did not tell appellant she could not continue to work, but suggested to her that if she felt unable to work, a functional capacity evaluation test would be helpful in documenting her work capacity. He submitted a November 9, 1993 functional capacity evaluation, which rated appellant in the category of sedentary work, but indicated that she could perform limited lifting of up to 10 pounds. Dr. Cenac reviewed the report from the physical therapist who completed the functional capacity evaluation test and indicated that the physical therapist had concurred with him on the restrictions applicable to appellant. While appellant contends that the test confirms that she could not case mail and perform the duties of her prior limited-duty job, the medical evidence does not support her contention that she became disabled from performing the job when she stopped on October 22, 1993. In his subsequent work restriction evaluation a year later, Dr. Cenac indicated that appellant could work in a full-time sedentary position with lifting up to 10 pounds for the entire day and lifting up to 20 pounds for 4 hours per day, along with intermittent breaks in activities. The Board notes that the work restrictions provided by Dr. Cenac are consistent with those under which appellant worked between March 4, 1991 and October 22, 1993. Based on the lack of a medical report supporting her inability to perform the job when she stopped on October 22, 1993, appellant has not established a recurrence of total disability due to her employment-related condition.

[12] *See Fred Foster*, 1 ECAB 21 (1947). Whether a particular injury causes an employee disability for employment is a medical issue which must be resolved by competent medical evidence; *see Debra A. Kirk-Littleton*, 41 ECAB 703 (1990).

The decisions of the Office of Workers' Compensation Programs dated August 9 and October 25, 1995, January 17, February 29 and March 29, 1996 are hereby affirmed.

Dated, Washington, D.C.
May 5, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member