U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN E. O'DELL and U.S. POSTAL SERVICE,
KANSAS CITY BULK MAIL CENTER, Kansas City, Kans.

Docket No. 97-420; Submitted on the Record;
Issued April 6, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined appellant had no loss of wage-earning capacity effective March 16, 1995 based on her actual earnings as a limited-duty letter carrier.

On May 16, 1989 appellant, then a 33-year-old letter carrier, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she injured her lower back while bending down to pick up a tray of mail. The Office accepted the claim for a low back strain and later expanded to include a laminectomy L4-5. The Office paid for appellant's surgeries on October 24, 1989 and April 5, 1991. Appellant accepted the employing establishment's offer of a modified work job on June 8, 1990. The Office placed appellant on the periodic rolls for temporary total disability effective June 30, 1991. Appellant returned to part-time work on July 8, 1991.

By letter dated February 4, 1994, the Office referred appellant, along with medical records and a list of questions to Dr. Robert Rondinelli, Associate Professor and Chairman, Department of Rehabilitation Medicine at the University of Kansas, for examination and treatment for residuals of her accepted May 16, 1989 employment injury.

In a letter dated April 18, 1994, Dr. Rondinelli opined that appellant was capable of working a full eight hours a day providing she had "opportunities for stretch brakes at regular intervals" and she avoid above the shoulder level activity.

By letter dated August 2, 1994, the employing establishment offered appellant the position of letter carrier (limited duty) which it noted was within the restrictions defined by Dr. Rondinelli. Appellant accepted the job offer and started her limited-duty position effective September 24, 1994. In accepting the job offer, appellant noted that she did so under duress as she feared aggravating and making her condition worse if she worked eight hours per day.

By letter dated August 24, 1994, Dr. V. Carlos Palmeri, appellant's attending physician, disagreed with extending appellant's work hours from six to eight hours per day. Dr. Palmeri opined that appellant was only capable of performing four hours of work per day because any more hours would put appellant "at risk of aggravating her back and leg pain. Even a four-hour day is exhausting for her."

The record indicates appellant stopped work on March 16, 1995.

By decision dated August 24, 1995, the Office issued a retroactive determination that appellant had no loss of wage-earning capacity based upon her job as a limited-duty letter carrier. The Office stated that appellant abandoned her suitable employment on March 16, 1995. In determining that appellant had no loss of wage-earning capacity, the Office noted that the current salary for her date-of-injury position was $656.58 per week and her weekly salary in the position of letter carrier was $656.58. The Office thus determined that appellant had no loss of wage-earning capacity.

In an attending physician's supplemental report (Form CA-20) dated May 4, 1995, Dr. Palmeri diagnosed chronic low back pain, sciatica, stress and depression and opined that appellant was totally disabled due to this condition.

In a note dated September 25, 1995, Dr. Palmeri noted that appellant attempted to work four hours per day which caused her "a marked increase in pain, frustration, and depression." Dr. Palmeri opined that appellant was totally disabled for any type of employment.

By letter dated September 22, 1995, appellant requested a hearing before an Office hearing representative.

In a letter dated February 16, 1996, appellant, through her counsel, disagreed with the August 24, 1995 decision. Appellant argued that she accepted the position under duress, that Dr. Palmeri stated she performed the position offered and that she finally quit on March 16, 1995 upon the advise of the Employees' Assistance Program. Appellant argued that she never abandoned suitable employment and that she remained totally disabled.

In a February 28, 1996 report, Dr. Gael E. Frank, based upon a history of the employment injury and a physical examination, opined that appellant has reached maximum medical improvement and she was totally disabled to work. Dr. Frank opined that appellant has fallen once this year and that she "might still 'suffer injury or harm if she is not restricted or accommodated," and was unable to return to work for the employing establishment.

A hearing was held on May 8, 1996 at which appellant was represented by counsel.

By decision dated July 22, 1996, the hearing representative affirmed the Office's August 24, 1995 decision that appellant had no loss of wage-earning capacity.

The Board finds that this case is not in posture for a decision.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation benefits.[1]

In the instant case, the Office procedures pertaining to cases where a claimant stops work after reemployment noted that if no wage-earning capacity rating has been completed at the time of the work stoppage the claims examiner will consider whether it is appropriate to issue a retroactive loss of wage-earning capacity determination.[2] A retroactive loss wage-earning capacity may result in an overpayment and a decrease in continuing compensation. The claims examiner will also need to ask the claimant for his or her reasons for ceasing work. However, if the reasons constitute an argument for a recurrence, appropriate development and evaluation of the medical and factual evidence will be undertaken. In *Terry Hedman*, 38 ECAB 222, the Board held that a partially disabled claimant who returns to a light-duty job has the burden of proving that he or she cannot perform the light duty, if a recurrence of total disability is claimed." In the present case, following her return to full-time limited duty, appellant continued to work until March 16, 1995. Her stated reasons for ceasing work constitute an argument for a recurrence of disability and medical evidence has been submitted on that issue.

As the Office failed to issue a loss of wage-earning capacity after appellant returned to limited duty effective September 24, 1994, the Office should consider appellant's March 16, 1995 claim as a recurrence of disability and follow the standard enunciated by the Board in *Hedman*.[3]

On remand, the Office shall further develop the claim as a request for a recurrence of disability as set forth in the Federal (FECA) Procedure Manual and consistent with Board precedent. After appropriate development of the evidence, the Office should issue a *de novo* decision on whether appellant has established that she sustained a recurrence of disability causally related to her accepted May 16, 1989 employment injury.

[1] *David W. Green*, 43 ECAB 883 (1992); *Bettye F. Wade*, 37 ECAB 556 (1986).

[2] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment Determining Wage-Earning Capacity*, Chapter 2.814.

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

The decision of the Office of Workers' Compensation Programs dated July 19, 1996 is hereby set aside and the case is remanded for further consideration pursuant to the above decision.

Dated, Washington, D.C.
April 6, 1999

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member