

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WILLIAM M. BAILEY and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Indianapolis, IN

*Docket No. 98-1215; Submitted on the Record;
Issued December 6, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's claim for total disability compensation beginning October 28, 1987 on the grounds that he abandoned suitable work; and (2) whether the Office properly found that appellant had no loss of wage-earning capacity based on his actual earnings as a modified truck driver.

The Office accepted that on October 23, 1985 appellant, then a 52-year-old truck driver, sustained muscle strains of the right posterolateral neck, right shoulder and right thoracic back, traumatic fibrosis and right shoulder avascular necrosis due to injuries sustained in a motor vehicle accident. Appellant continued to work as a truck driver with restrictions. The Office paid appellant compensation for intermittent periods of temporary total disability until September 23, 1986, when he returned to full-time limited-duty employment.

In a report dated September 15, 1986, Dr. Bruce H. Whitley, an employing establishment physician, performed a fitness-for-duty examination on appellant and found that he could resume work without restriction. The record indicates, however, that appellant continued to perform modified employment as a truck driver.

In a December 30, 1986 statement submitted in conjunction with appellant's application for disability retirement, appellant's supervisor indicated that appellant was not able to perform the duties of his position. In a form signed January 8, 1987, the employing establishment related that since appellant's return to work on September 23, 1986 it had accommodated his limitations and that reassignment was not possible. Accompanying the request for disability retirement was a May 2, 1986 form report from Dr. Raymond O. Pierce, a Board-certified orthopedic surgeon, who found that appellant was disabled from employment.

By letter dated April 22, 1987, the employing establishment indicated that appellant's position had "been identified for abolishment to better utilize resource allocations."

In an office visit note dated April 29, 1987, Dr. John K. Schneider, a Board-certified orthopedic surgeon and appellant's attending physician, related that appellant had "constant unrelenting right shoulder pain" since his 1985 motor vehicle accident. Dr. Schneider noted that appellant related difficulty performing his job as a truck driver. He further indicated that appellant had sickle cell anemia and hearing loss. Dr. Schneider found that x-rays revealed avascular necrosis and recommended a total shoulder replacement.

By letter dated August 8, 1988, appellant informed the Office that he had retired on disability effective October 28, 1987 as a result of his employment injury and inquired whether he was entitled to receive compensation or a schedule award. On October 15, 1988 appellant filed a claim for a recurrence of disability causally related to his October 23, 1985 employment injury.

In a report dated October 5, 1989, Dr. Schneider discussed appellant's history of a motor vehicle accident in 1985 and diagnosed avascular necrosis due to his injury. He opined that appellant's shoulder was "a continuing source of disability." In a form report dated November 2, 1988, Dr. Schneider found appellant totally disabled from employment.

By decision dated May 15, 1991, the Office granted appellant a schedule award for a 36 percent permanent impairment of his right arm.

In a letter dated September 1, 1992, the Office informed appellant that his schedule award would terminate December 9, 1992 and that he should notify the Office if he believed that he had a loss of wage-earning capacity.

By letter dated March 30, 1993, appellant informed the Office that he was no longer working due to disability from his employment injury. Appellant submitted medical evidence which indicated that he continued to receive treatment for shoulder pain.

By letter dated May 16, 1994, the Office notified appellant that the pertinent issue was whether he was capable of performing his work duties effective October 28, 1987 and requested that he submit a medical report discussing his ability to perform his employment.

In a report dated November 16, 1994, Dr. Schneider related:

"It is my understanding that [appellant] worked as a truck driver. His shoulder problem is sufficiently severe to prevent him from performing this type of work. The objective findings which prevented him from continuing to work as a truck driver include rather significant restrictions in range of motion of the right shoulder as well as persistent pain in the shoulder which would prevent him from being able to safely operate a heavy motor vehicle.

"Additionally, they asked for an opinion regarding whether or not [appellant] is totally disabled for all work solely due to his medical problem secondary to the 1985 auto accident. With regard to this, I would respond that [appellant's] job was that of a truck driver and that he was totally disabled in performing truck

driving duties. This is solely secondary to the injury he sustained in the auto accident of 1985.

“With regard to whether or not [appellant] can perform any type of work, I have no opinion. This assessment would depend upon his educational level and the level of specific job training that he has had.”

By letter dated January 12, 1995, the employing establishment informed the Office that appellant was accommodated following his employment injury by “only being allowed to drive a truck” and that the position would have remained available to appellant had he not chosen retirement. The employing establishment did not address the April 22, 1987 letter, in which it noted that appellant’s position was identified for abolishment.

By letter dated January 25, 1995, the Office requested that Dr. Schneider provide an opinion regarding whether appellant, working solely as a truck driver without other duties, could perform his employment from October 28, 1987 to October 15, 1990. Dr. Schneider, however, did not respond to the Office’s request for information.

By decision dated September 8, 1995, the Office denied appellant’s claim for compensation after October 28, 1987 on the grounds that he neglected to work after suitable work was procured under section 8106(c).

Appellant requested a hearing before an Office hearing representative, which was held on September 12, 1995. In a decision dated June 14, 1996, the hearing representative affirmed the Office’s September 8, 1995 decision finding that appellant had neglected suitable work. The hearing representative further performed a retroactive wage-earning capacity analysis and concluded that appellant’s actual earnings in the position of modified truck driver fairly and reasonably represented his wage-earning capacity. He then determined that appellant had no loss of wage-earning capacity as he was earning the same wages as in his date-of-injury position. The hearing representative concluded that appellant had not established modification of the wage-earning capacity determination. By decisions dated September 24 and December 10, 1997, the Office denied modification of its prior decision.

The Board finds that the Office did not properly determine that appellant abandoned suitable work.

Section 8106(c)(2) of the Federal Employees’ Compensation Act states that “a partially disabled employee who refuses or neglects to work after suitable work is offered to, procured by, or secured for him, is not entitled to compensation.”¹ However, to justify such termination, the Office must show that the work offered was suitable.² An employee who refuses or neglects to

¹ 5 U.S.C. § 8106(c)(2).

² *David P. Camacho*, 40 ECAB 267 (1988).

work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.³

In cases where appellant ceases work after reemployment and the Office has not issued a formal loss of wage-earning capacity (LWEC) determination, the Office's procedure manual provides as follows:

"If no formal LWEC decision has been issued, the CE [claims examiner] must ask the claimant to state his or her reasons for ceasing work and make a suitability determination on the job in question. If the job is considered suitable, the CE then advises the claimant that he or she has the burden of proving total disability ... after return to work and invite the claimant to submit a Form CA-2a.

(1) *If the reasons stated by the claimant amount to an argument for a recurrence, the CE should develop and evaluate the medical and factual evidence upon receipt of Form CA-2a....*"⁴ (Emphasis in the original.)

In the instant case, appellant filed a claim for a recurrence of disability and the Office undertook development of the claim. In its initial decision, however, the Office terminated appellant's compensation based on its finding that he had abandoned suitable work. According to the Office's procedures, as appellant stopped work after returning to employment and the Office had not issued a wage-earning capacity decision, the Office should have adjudicated the case as a claim for a recurrence of disability.

Additionally, it is well settled that the termination of benefits under section 8106(c) raises due process and fairness considerations.⁵ The Supreme Court has held that the essential requirements of due process are "notice and an opportunity to respond."⁶ These essential due process principles require that an employee have "at least notice and an opportunity to respond in some manner" prior to the termination of compensation benefits.⁷ Accordingly, the Board finds that appellant's compensation may not be terminated under section 8106(c)(2) for neglecting suitable work without prior notification and an opportunity to respond.⁸

In the present case, the Office applied section 8106(c) in its September 8, 1995 decision without prior notification to appellant. The Office failed to notify appellant of the provisions of section 8106(c), the consequences of failure to comply with these provisions and failed to

³ 20 C.F.R § 10.124; *see Catherine G. Hammond*, 41 ECAB 375 (1990).

⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9.b and 9.b(1), respectively (December 1995).

⁵ *Maggie L. Moore*, 42 ECAB 484 (1991), *reaff'd on recon.*, 43 ECAB 818 (1992).

⁶ *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

⁷ *Raditch v. United States*, 929 F.2d 478, 480 (9th Cir. 1991).

⁸ *Mary A. Howard*, 45 ECAB 646 (1994).

provide an opportunity to respond. For these reasons, the Board finds that the Office failed to meet its burden to terminate appellant's compensation benefits under section 8106(c).

The Board further finds that the Office did not properly determine that appellant had no loss of wage-earning capacity based on its finding that his actual earnings as a modified truck driver fairly and reasonably represented his wage-earning capacity.

In the instant case, the Office procedures pertaining to cases where a claimant stops work after reemployment indicate 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.⁹ The claims examiner must ask the claimant for his or her reasons for ceasing work. If the reasons constitute an argument for a recurrence of disability, appropriate development and evaluation of the medical and factual evidence will be undertaken. In *Terry Hedman*,¹⁰ 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, appellant worked in a limited-duty capacity from September 23, 1986 until October 28, 1987, when he retired on disability. Appellant informed the Office that he retired due to his employment injury and, on October 15, 1988, filed a claim for a recurrence of disability. His stated reasons for ceasing work thus constitute an argument for a recurrence of disability, and appellant has submitted medical evidence on this issue.

As the Office failed to issue a loss of wage-earning capacity decision after appellant returned to limited-duty employment on September 23, 1986, the Office should consider appellant's October 1988 recurrence of disability claim under the standard enunciated by the Board in *Terry Hedman*.¹¹

On remand, the Office should further develop the claim as 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 he sustained a recurrence of disability on or after October 1987 causally related to his accepted October 23, 1985 employment injury.

⁹ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b)(1) (December 1995).

¹⁰ 38 ECAB 222 (1986).

¹¹ See *supra* note 10.

The decisions of the Office of Workers' Compensation Programs dated December 10 and September 24, 1997 are set aside and the case is remanded for further consideration pursuant to the above decision.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member