U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PETER B. MOUSER and DEPARTMENT OF THE NAVY, NAVAL ORDANCE STATION, Louisville, Ky.

Docket No. 96-1812; Submitted on the Record;
Issued February 4, 1999

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation benefits, effective May 22, 1995, based on its determination that appellant's actual earnings in the position of electrical equipment worker fairly and reasonably represented appellant's wage-earning capacity.

The Board has duly reviewed the case record in the present appeal and finds that the Office properly reduced appellant's compensation benefits, effective May 22, 1995, based on its determination that appellant's actual earnings in the position of electrical equipment worker fairly and reasonably represented appellant's wage-earning capacity.

On February 27, 1995 appellant, then an electrical equipment worker, filed a claim for an occupational disease (Form CA-2) alleging that after he stopped cables with his left hand and pulled cables with his right hand, he experienced numbness in his right upper back, which affected his right shoulder and arm. Appellant also alleged that he first became aware of his back condition on February 10, 1995 and aware that his back condition was caused or aggravated by his employment on February 13, 1995. Appellant stopped work on March 29, 1995. Appellant returned to work at the employing establishment in a limited-duty position of electrical equipment worker on May 22, 1995.[1]

By letter dated May 22, 1995, the Office accepted appellant's claim for lumbar strain.

By decision dated July 22, 1995, the Office found that appellant's reemployment as an electrical equipment worker with wages of $554.80 per week fairly and reasonably represented his wage-earning capacity effective May 22, 1995.

[1] The Board notes that appellant worked in the limited-duty position of electrical equipment worker on the date of injury.

On September 13, 1995 appellant filed a claim for continuing compensation on account of disability (Form CA-8) for the period May 26 through September 3, 1995. By decision dated October 14, 1995, the Office denied appellant's claim for compensation on the grounds that appellant was advised on July 22, 1995 that the position of electrical equipment worker fairly represented his wage-earning capacity.

In a March 5, 1996 letter, appellant requested reconsideration of the Office's decision. By decision dated March 26, 1996, the Office denied appellant's request for reconsideration without a review of the merits of the claim on the grounds that the evidence submitted was repetitious, irrelevant and immaterial and, therefore, insufficient to warrant review of the prior decision.

Once the Office accepts a claim and pays compensation, as here, it has the burden to justify termination or modification of compensation benefits.[2] Pursuant to section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual earnings received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[3] The Board has stated that "[g]enerally, 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 wage-earning capacity, must be accepted as such measure."[4]

The Office's procedures indicate that, after a claimant has returned to work for 60 days, a determination will be made as to whether the actual earnings fairly and reasonably represented the claimant's wage-earning capacity.[5]

In the present case, the Office accepted appellant's claim for lumbar strain. Based on a medical release by Dr. Lawrence Jelsma, a neurosurgeon, as indicated in his May 8, 1995 disability certificate and Dr. S.T. Vanover, a Board-certified family practitioner, as indicated in his May 22, 1995 medical treatment notes, appellant returned to work in the limited-duty position of an electrical equipment worker on May 22, 1995.

Although appellant missed time from work during the period May 26 through July 22, 1995, there is no rationalized medical evidence of record establishing that appellant's employment-related back condition prevented him from performing the duties of an electrical equipment worker.

In a June 6, 1995 attending physician's report (Form CA-20) from Dr. Vincent Paul Tanamachi, a family practitioner, indicated a diagnosis of back strain. Dr. Tanamachi also

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[2] *Harold S. McGough*, 36 ECAB 332 (1984).

[3] 5 U.S.C. § 8115(a).

[4] *Gregory A. Compton*, 45 ECAB 154 (1993); *Clarence D. Ross*, 42 ECAB 556 (1991); *Floyd A. Gervais*, 40 ECAB 1045, 1048 (1989); *Hubert F. Myatt*, 32 ECAB 1994 (1981); *Lee R. Sires*, 23 ECAB 12 (1971).

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

indicated that appellant's condition was caused or aggravated by an employment activity, specifically, pulling cables, by placing a checkmark in the box marked "yes." Regarding appellant's ability to return to light-duty work, Dr. Tanamachi stated that appellant was to follow-up with a neurosurgeon who was to determine whether he could return to work. Dr. Tanamachi further stated that appellant had no permanent effects as a result of his employment injury.

Dr. Jelsma's June 7, 1995 Form CA-20 revealed that appellant had lumbar degenerative disc disease at L5-S1. His report further revealed that appellant's condition was caused or aggravated by an employment activity by placing a checkmark in the box marked "yes." Dr. Jelsma stated that appellant's history of low back pain had been consistent with strains at work. He also indicated that appellant was able to return to work on May 22, 1995 and that appellant had no permanent effects as a result of his employment injury.

In his June 7, 1995 disability certificate, Dr. Jelsma indicated that appellant was being treated for lumbar degenerative disc disease (exacerbation of pain). The June 12, July 4 and August 7, 1995 disability certificates of Dr. Thomas W. Raley indicated that appellant was being treated for lumbalgia. His August 21 and September 19, 1995 disability certificates revealed that appellant was being treated for low back problems. In his October 17 and 27, 1995 disability certificates, Dr. Raley indicated that appellant was being treated for low back problems. Dr. Raley's October 30, 1995 disability certificate indicated that appellant was being treated for lumbago. Dr. Raley's November 28, 1995 disability certificate indicated that appellant had lumbalgia/nerve irritation. Dr. Jelsma's and Dr. Raley's disability certificates all indicated that appellant could return to work. In addition, Dr. Raley's July 20 and 27, 1995 disability certificates, Dr. Vanover's September 25, 1995 disability certificate and Dr. Tanamachi's September 25, 1995 disability certificate revealed that appellant could return to work.

Dr. Vanover's medical treatment notes covering the period June 12 through September 5, 1995 regarding appellant's back condition failed to establish that appellant was totally disabled from work due to residuals of his February 1995 employment injury. Specifically, in his June 12, 1995 medical treatment notes, Dr. Vanover indicated that appellant was able to return to work based on Dr. Jelsma's June 7, 1995 statement. Further, in his June 20, 1995 treatment notes, Dr. Vanover noted appellant's complaints of pain on the right side and appellant's statement that it effected his handwriting. Dr. Vanover responded "that does [not] even make sense!" Dr. Vanover's June 27, July 13 and August 31, 1995 treatment notes indicated that appellant's back condition had improved. In these notes, Dr. Vanover stated that appellant could perform light-duty work with restrictions of lifting no more than 25 pounds. Previously, appellant was limited to lifting no more than 20 pounds.

Dr. Raley's September 14, 1995 supplemental attending physician's report (Form CA-20a) revealed a diagnosis of 724.3 and that appellant's condition was caused by the injury, for which compensation was claimed by placing a checkmark in the box marked "yes." Dr. Raley's report further revealed that appellant was partially disabled and had performed some work on September 5, 1995.

Inasmuch as there is no evidence of record establishing that appellant remains totally was totally disabled from work due to any residuals of his February 1995 employment injury, the

Office properly reduced appellant's compensation benefits, effective May 22, 1995, based on appellant's actual earnings in the limited-duty position of an electrical equipment worker.[6]

The March 26, 1996, and October 14 and July 22, 1995 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
February 4, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See Albert L. Poe*, 37 ECAB 684, 689 (1986).