U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ERNEST E. HAYGOOD and U.S. POSTAL SERVICE,
POST OFFICE, Rochester, NY

Docket No. 97-1830; Submitted on the Record;
Issued October 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant has established that on October 7, 1996 he sustained a recurrence of disability such that he can no longer perform his light-duty job.

The Board has duly reviewed the case record and finds that this case is not in posture for a decision.

In the present case, the Office of Workers' Compensation Programs accepted that on June 25, 1980 appellant, then a 33-year-old mail handler, sustained a low back strain in the performance of duty. Appellant also had a previously accepted cervical strain as well as a preexisting herniated disc which necessitated a 1972 laminectomy and a 1976 discectomy. Appellant returned to work four hours a day on August 20, 1980 and since then has sustained at least four accepted recurrences of disability, the most recent occurring on April 27, 1995.

Subsequent to the April 27, 1995 recurrence, on November 9, 1995, the employing establishment offered appellant a light-duty position as a modified distribution clerk, to be performed three hours a day within the physical restrictions outlined by appellant's primary treating physician at the time, Dr. William R. Saunders.[1] Appellant accepted the position and returned to work on December 10, 1995. By letter dated December 11, 1995, Dr. Saunders requested that appellant's schedule be reduced to two hours a day. In order to obtain a clear picture of appellant's capabilities, the Office arranged for a second opinion examination to be performed by Dr. Rouhollah Javid, a Board-certified neurological surgeon. In a report dated June 26, 1996, Dr. Javid opined that appellant could work for four hours a day within certain physical restrictions. Based on Dr. Javid's report, on October 1, 1996 the employing establishment offered appellant a new position also as a modified distribution clerk, but for four hours a day and with different physical restrictions than contained in the description of his previous light-duty job. Appellant accepted the new position, adding that he was going against the recommendations of his doctors but would give it a try.

[1] The employing establishment first sent a copy of the position description to Dr. Saunders, who approved it on October 30, 1995.

Appellant began the new position on October 7, 1996, but stopped work after approximately an hour and a half and claimed a recurrence of total disability. Appellant stated that the repeated bending and reaching over his head necessitated by his new light-duty job restrictions caused him to experience severe pain and to seek immediate medical attention. Appellant returned to work on October 16, 1996, but declined to work more than two hours a day. The Office denied appellant's notice of recurrence of disability by decision dated January 13, 1997. Appellant requested reconsideration and in a decision dated April 23, 1997, the Office denied appellant's request for review on the grounds that the arguments and evidence submitted were immaterial to the issue in this case.

When an employee, who is disabled from the job he or she held when injured on the account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform a 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.[2]

Prior to his claimed October 7, 1996 recurrence of disability, appellant had been working three hours a day, although subsequently began working only two hours a day, and was not required to lift more than ten pounds at a time, with no pushing, bending, squatting, climbing, pulling or twisting. He was provided with a chair that enabled him to keep his feet flat on the floor and was further provided with a tilt top table to accommodate restrictions regarding continuous flexion of his cervical spine. These restrictions were approved by appellant's primary physician at the time, Dr. Saunders. Appellant has submitted reports from his current treating physicians, Dr. Thomas M. Ashby, a Board-certified internist and Dr. Robert S. Bakos, a Board-certified neurological surgeon, who are primarily in agreement as to appellant's physical capabilities. In his report dated October 3, 1996, shortly before appellant began his most recent light-duty position, Dr. Ashby opined that appellant could work two to three hours a day with no lifting over ten pounds and no bending, squatting, climbing, kneeling, twisting or reaching above the shoulder. These restrictions were largely consistent with the restrictions of the position appellant was performing prior to October 7, 1996, as outlined above. In a report dated September 8, 1996, Dr. Bakos similarly opined that appellant could perform work involving no lifting over 10 pounds and no bending, squatting, climbing, kneeling, twisting, pushing, pulling or reaching above the shoulders.

The Office referred appellant to Dr. Javid, for a second opinion examination. In his narrative report dated June 26, 1996, Dr. Javid concluded that the extent of appellant's residual disability prevented him from returning to work full time, but that he was able to work part time with restrictions on lifting, bending and reaching above the head. In a work capacity evaluation report completed the same day, Dr. Javid specified that appellant could work 4 hours a day, with restrictions on twisting, repeated bending and lifting above the head and lifting no more than 10 to 15 pounds. Based on Dr. Javid's recommendations, the employing establishment offered appellant the new light-duty position, for 4 hours a day, which provided that the duties of appellant's position would remain the same, but would be performed within the restrictions of

[2] *Mary A. Howard*, 45 ECAB 646 (1994); *Terry Hedman*, 38 ECAB 222 (1986).

intermittent sitting standing and walking, intermittent lifting between 10 to 15 pounds, limited reaching above the head and limited repeated bending.

The Board finds that appellant has established that on October 7, 1996, the first day of the new light-duty position, there was a change in the nature and extent of appellant's light-duty job requirements. In addition, the Board finds that a conflict exists in the medical opinion evidence as to whether appellant can perform the new light-duty job. Section 8123(a) of the Federal Employees' Compensation Act[3] provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[4] On remand, the Office shall refer appellant to an appropriate specialist for an impartial medical opinion. The impartial medical specialist shall determine whether appellant's accepted back condition or any change in appellant's light-duty job requirements caused appellant's total disability for work on or after October 7, 1996 and his diminished capacity for work following his return to work on October 16, 1996. After such further development as necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated April 23 and January 13, 1997 are hereby set aside and this case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.
October 22, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[3] 5 U.S.C. § 8123(a).

[4] *Harrison Combs, Jr.*, 45 ECAB 716 (1994).