U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of STEAPHEN A. WINBORNE and U.S. POSTAL SERVICE,
POST OFFICE, Mandeville, LA

Docket No. 98-99; Submitted on the Record;
Issued September 1, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether appellant established his claim for continuing disability for the period July 1 through August 1, 1997.

On October 18, 1996 appellant, then a 46-year-old letter carrier, filed an occupational disease claim alleging that he developed chronic tendinitis in the right shoulder as a result of repetitive movement in the performance of duty. Appellant noted on his CA-2 claim form that he first realized that he had a right shoulder condition on September 30, 1996. The Office of Workers' Compensation Programs accepted the claim for a right shoulder impingement syndrome on June 19, 1997.

Appellant has been under the care of Dr. Charles W. Krieger for his right shoulder condition. In an October 21, 1996 report, Dr. Krieger advised that appellant was unable to perform his duties as a letter carrier … "no casing or pulling down of mail, heavy lifting or street duties." He, however, released appellant for "light duty only."

By letter dated October 22, 1996, appellant advised the employing establishment that he had been approved for light duty and requested a work assignment.

By letter dated October 29, 1996, appellant informed the Office that he had been told by his supervisor that there was no light duty available at his regular duty station and that "[he] could not be posted at any other station on light-duty assignment until they [the employing establishment] heard from [the Office]."

In a treatment note dated May 13, 1997, Dr. Krieger noted that appellant returned at the request of the Office for reevaluation of his work capabilities. He noted, however, that "[appellant] has never brought a complete official job description" for review. According to Dr. Krieger, appellant's restrictions included that he avoid repetitive overhead movement and what appellant described as "repetitive pulling type maneuver." He concluded that appellant

essentially needed a functional evaluation based on available jobs since he was unable to case mail.

In an attending physician's report on June 3, 1997 Dr. Krieger indicated that he had treated appellant for chronic subacromial impingement syndrome of the right shoulder caused by the "repetitive overhead movement of pulling while casing mail." Dr. Krieger noted that he had approved appellant for light duty on October 21, 1996. Dr. Krieger again advised that appellant was to avoid repetitive overhead movement.

On June 30, 1997 appellant filed a Form CA-7 claiming compensation for wage loss from October 21, 1996 through June 30, 1997.

By letters dated June 19 and August 19, 1997, the Office requested that appellant submit medical evidence to establish his disability for the periods claimed.

On July 29, 1997 appellant filed a Form CA-8 claiming compensation for wage loss from July 1 through August 1, 1997.

To support her CA-8 claim for continuing wage loss, appellant subsequently submitted an August 31, 1997 attending physician's report prepared by Dr. Krieger. He noted that his most recent examination of appellant was on January 25, 1997 for right shoulder pain-related subacromial impingement syndrome caused by factors of appellant's employment. Dr. Krieger further noted that appellant had been approved for a return to work with restrictions. He noted that appellant was to avoid overhead upper extremity movement to no more than one hour per eight-hour shift.

In a decision dated September 4, 1997, the Office denied appellant's claim for continuing compensation on the grounds that the evidence of record was insufficient to establish that he was totally disabled for work from July 1 to August 1, 1997.

The Board finds that the Office improperly denied appellant's claim for continuing compensation for the period July 1 through August 1, 1997.[1]

A person who claims benefits under the Federal Employees' Compensation Act[2] has the burden of establishing the essential elements of his claim, including the fact that an injury occurred in the performance of duty as alleged and that disability for employment was sustained as a result thereof.[3] To establish entitlement to continuation of pay or monetary compensation

[1] Appellant submitted additional evidence to the Office after the issuance of the July 15, 1999 decision denying compensation. He also submitted new evidence to the Board with respect to the denial of his hearing request. The Board has no jurisdiction to review evidence submitted by appellant subsequent to the Office's July 15, 1999 decision, or for the first time on appeal; *see* 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. §§ 8101-8193.

[3] *See Charlene R. Herrera*, 44 ECAB 361 (1993); *Dean E. Pierce*, 40 ECAB 1249 (1989).

benefits, an employee must establish through competent medical evidence that the disability from work resulted from the employment injury.[4]

In the instant case, the Office accepted that appellant sustained right shoulder impingement syndrome. The issue on appeal is whether the Office properly denied appellant's claim for compensation for the period July 1 through August 1, 1997 on the grounds that appellant was not totally disabled for work as his treating physician, Dr. Krieger, had previously approved him for light duty on October 21, 1996.

Contrary to the Office's determination, however, the Board notes that in accordance with 20 C.F.R. § 10.122(c), appellant advised the employing establishment and the Office that he had been approved for work and that he wanted a light-duty accommodation. Appellant specifically informed the Office that he had been advised by his supervisor that no light duty was available at his regular duty station and that "[he] could not be posted at any other station on light-duty assignment until they [the employing establishment] heard from [the Office]." Thereafter, it appears that appellant was never contacted by the employing establishment or the Office about a return to light duty. In subsequent attending physician reports dated June 3 and August 31, 1997, Dr. Krieger confirmed that appellant was capable of performing light work with the primary restriction being that he avoid overhead movement of the right upper extremity to no more than one hour per day.

Under the Office's regulations, an employee must cooperate with the Office and seek and accept an offer of suitable work after an employee has been advised by the employing establishment that light-duty work is available. In this connection, the Board notes that section 10.124(b) of the Office's regulations, 20 C.F.R. § 10.124(b), provides:

> "Where an employee has been advised by the employing agency in writing of the existence of specific alternative positions within the agency, the employee shall furnish the description and physical requirements of such alternative positions to the attending physician and inquire whether and when the employee will be able to perform such duties. Where an agency has advised the employee of its willingness to accommodate, where possible, the employee's work limitations and restrictions, the employee shall so advise the attending physician to specify the limitations and restrictions imposed by the injury. The employee has the responsibility to advise the employing agency immediately of the limitations and restrictions imposed."

In the present case, however, the record does not indicate that the employing establishment advised appellant in writing of a light-duty position or other available

[4] *Debra A. Kirk-Littleton*, 41 ECAB 703 (1990); *Daniel R. Hickman*, 34 ECAB 1220 (1983). As used in the Act, the term "disability" means incapacity because of an injury in employment to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity. The general test in determining loss of wage-earning capacity is whether the employment-related impairment prevents the employee from engaging in the kind of work he was doing when he was injured; *see Frazier V. Nichol*, 37 ECAB 528, 540 (1986).

accommodation as required by the applicable regulations noted above.[5] Although appellant informed both the employing establishment and the Office in writing of his availability for light-duty work, he received no further response. Thus, based on the employing establishment's failure to offer appellant a light-duty position or other accommodation within his medical restrictions, the Board finds that appellant is entitled to compensation for wage loss for the period July 1 through August 1, 1997.

The decision of the Office of Workers' Compensation Programs dated September 4, 1997 is hereby reversed.

Dated, Washington, D.C.
September 1, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[5] *Charlene R. Herrera*, 44 ECAB 361 (1993) (holding that oral notification of light-duty positions does not shift the burden to appellant to inquire about and receive from his physician the duty restrictions to be presented to the employing establishment).