U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. GRAHAM and U.S. POSTAL SERVICE,
POST OFFICE, Culver City, CA

Docket No. 97-1019; Submitted on the Record;
Issued January 20, 2000

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that the position of hotel clerk reasonably represented appellant's wage-earning capacity effective January 11, 1996, the date it reduced his compensation benefits; (2) whether the Office properly calculated appellant's wage-earning capacity; (3) whether appellant has established that he sustained any emotional or physical consequential injury; and (4) whether the Office properly denied appellant's request for relocation expenses.

On March 15, 1987 appellant, then a 34-year-old custodial laborer, filed an occupational disease claim, alleging that he sustained allergic rhinitis and dermatitis beginning February 1987 that was causally related to factors of his federal employment. Appellant did not stop work but used intermittent periods of leave until March 21, 1987. The employing establishment placed appellant on restricted leave status and placed him in a limited-duty position effective May 15, 1987. The employing establishment terminated that position effective August 23, 1987. The Office accepted appellant's claim for precipitation of bronchitis and asthma. Although the employing establishment settled a grievance with appellant and agreed that he had been improperly terminated from his limited-duty position, appellant was not returned to work. Appellant underwent rehabilitation efforts, and he returned to work March 27, 1991 and resumed regular full-time pay May 4, 1991. Appellant ceased work in August 1991 due to a recurrence of disability.

Appellant began participation in a vocational rehabilitation program and was enrolled in MTMA School for training as an apartment manager/hotel clerk beginning October 1993. This program was modified in 1994, and appellant completed the program April 1995. In a report dated September 20, 1995, Richard Sheridan, a rehabilitation specialist, indicated that rehabilitation services were complete and noted that appellant had moved to Eugene, Oregon. He reported that appellant had completed a motel manager training program and that work as an apartment manager or hotel clerk was vocationally suitable within the Eugene, Oregon area.

In a decision dated July 13, 1995, the Office determined that the proper pay rate for appellant was $20,405.84 per year or $392.42 per week. In the memorandum accompanying the decision, the Office noted that appellant was a Level 3 Step A employee and calculated appellant's weekly pay rate based on 20 weeks of actual earnings between March 27 and August 23, 1991. The Office reported that during the period of June 14 to August 23, 1991 appellant worked 298.12 hours at $12.42 for a total of $3,702.56 in earnings and that during the period of March 27 to June 14, 1991 appellant worked 413.67 hours at $12.27 for a total of $5,075.73 in earnings. This provided a total in earnings of $8,778.38 for 20 weeks of work for $438.92 per week on average. The Office also reported that appellant had resumed full-time work at his regular salary May 4, 1991. In its July 1995 decision, the Office concluded that appellant was entitled to a weekly pay rate of $418.02 effective during his August 11, 1991 recurrence of disability, and this effective pay rate was retroactive to the check dated September 3, 1991.

In a letter dated November 8, 1995, the Office advised appellant that it proposed a reduction of compensation based on the August 1994 report of his physician which indicated that he was capable of some work. The Office found that based on his completion of coursework in hotel management and a review of the labor market survey prepared by the rehabilitation services for Eugene, Oregon, appellant was capable of working as a hotel clerk. The Office reiterated that appellant's pay rate had been modified July 1995, resulting in a lower compensation check as appellant had fewer CPI increases after the August 1991 recurrence of disability. The Office advised appellant that he was capable of earning $210.00 per week as a hotel clerk and that his weekly compensation check would be reduced accordingly to $171.00 per week. In a decision dated January 11, 1996, the Office reduced appellant's compensation, finding that the position of hotel clerk fairly and reasonably represented his wage-earning capacity and constituted suitable work. The Office also denied appellant's claims that he had sustained an emotional condition or aggravation of his preexisting hernia condition as a consequence of his accepted employment injury. Finally, the Office found that it properly calculated appellant's pay rate based on his August 1991 recurrence of disability and properly denied his request for relocation costs.

The Board has duly reviewed the case record on appeal and finds that the Office improperly determined that the position of hotel clerk reasonably represented appellant's wage-earning capacity pursuant to section 8115 of Federal Employees' Compensaton Act.

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. Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions given the nature of the employee's injuries and the degree of physical impairment, his or her usual employment, the employee's age and vocational qualifications and the availability of suitable employment.[1] When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's

[1] *See generally* 5 U.S.C. § 8115(a), A. Larson, *The Law of Workers' Compensation* § 57.22 (1989); *see also Bettye F. Wade*, 37 ECAB 556 (1986).

Dictionary of Occupational Titles or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination or wage rate and availability in the open market should be made through contact with the state employment service or other applicable services. Finally, application of the principles set forth in the *Alfred C. Shadrick*[2] decision will result in the percentage of the employee's loss of wage-earning capacity.[3]

In the present case, the Office determined that the position of hotel clerk reasonably represented appellant's wage-earning capacity based on a review of the labor market survey prepared by the rehabilitation specialist for the Eugene, Oregon area and the medical evidence of record. However, the record is devoid of any medical evidence which establishes that the position of hotel clerk was medically suitable work for appellant. Although appellant's physician, Stephen E. Levy, provided a report dated August 11, 1994 in which he indicated that the position of an apartment manager along the California coastal area was within appellant's capabilities, Dr. Levy did not review or express an opinion on the suitability of work for appellant as a hotel clerk nor assess whether this position was within appellant's capabilities in the Oregon geographical area.[4] The Office also requested information from Dr. T.G. Hostetler, who had performed a second opinion examination in August 1992. In a report dated February 18, 1994, Dr. Hostetler noted that his opinion was based on his memory of appellant and found that appellant could perform the duties of apartment manager and that this work was suitable for him. In a work restriction form, Dr. Hostetler reported that appellant could sit continuously for eight hours a day, could stand intermittently for four hour a day, could walk, lift, kneel and twist intermittently for two hours a day and could bend, squat and climb intermittently for one hour a day. A review of the record reveals that the positions of hotel clerk and apartment manager have different numbers in the *Dictionary of Occupational Titles* as well as different physical requirements. The Federal Procedure manual requires that the claims examiner determine whether a position is medically suitable based on the medical evidence and request additional information from the treating physician, a second opinion physician or the District medical adviser if the medical evidence is unclear.[5] As discussed *infra*, the Office did not obtain medical reports which specifically addressed whether appellant was capable of performing work as a hotel clerk. Moreover, the report by Dr. Hostetler is based on his memory of a physical examination from August 1992 and is therefore of limited probative value as it is not based on a contemporaneous physical examination. As the medical evidence of record does not address whether the position of a hotel clerk was medically suitable, the Office improperly determined that this position was suitable under section 8115 of the Act.[6]

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[2] 5 ECAB 376 (1953).

[3] *See Hattie Drummond*, 39 ECAB 904 (1988); *Albert C. Shadrick, supra* note 2.

[4] In finding the position suitable for appellant in the California coastal area, Dr. Levy opined that this area had less pollution.

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1993).

[6] The Board notes that appellant alleged that he could not perform this work due to an injury to his leg which occurred after he moved to Oregon. However, medical conditions which occur subsequent to the work-related

The Board also finds that the Office erred in determining appellant's rate of compensation.

Section 8105(a) of the Act provides: "If the disability is total, the United States shall pay the employee during the disability monthly compensation equal to 66 2/3 percent of his monthly pay, which is his basic compensation for disability."[7]

Section 8101(4) of the act defines "monthly pay" as "the monthly pay at the time of the injury or the monthly pay at the time disability begins, or the monthly pay at the time disability recurs, if the recurrence begins more than six months after the injured employee resumes regular full-time employment with the United states, whichever is greater."[8]

In its July 13, 1995 decision, the Office determined that appellant's weekly compensation was $418.02, effective the date of his August 11, 1991 recurrence.[9] However, a review of the record reveals that appellant became injured while in the performance of duty effective December 10, 1986 and stopped work on or about March 21, 1987. He then accepted a limited-duty position which was terminated, albeit erroneously, on or about August 23, 1987. Appellant received compensation for temporary total disability until March 27, 1991 when he returned to work. He then returned to regular full-time federal employment effective May 4, 1991. While it is clear that appellant had a recurrence of disability beginning August 11, 1991 since his work stoppage at that time was due to his employment-related condition, this date is not six months after appellant returned to work on May 4, 1991. Therefore, under section 8101(4), the Office improperly based appellant's monthly pay on his pay rate at the time his disability recurred on August 11, 1991.[10] Thus, this case must be remanded for recomputation of appellant's pay rate based on either the time of injury or the time disability began in accordance with section 8101(4) the Act.

The Board further finds that appellant did not establish that he sustained either an emotional condition or aggravation of his preexisting hernia condition as a consequence of his accepted employment injury.

The basic rule respecting consequential injuries, as expressed in Larson, is "when the primary injury is shown to have arisen out of and in the course of employment, every natural

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injury are not to be considered in determining the medical suitability of the constructed position; *see* Federal (FECA) Procedure Manual, *supra* note 5.

[7] 5 U.S.C. § 8105(a); *see id.* § 8110(b) (a disabled employee with one or more dependents is entitled to have his basic compensation for disability augmented at the rate of 8 1/3 percent of his monthly pay if that compensation is payable under section 8105 or 8107(a)).

[8] 5 U.S.C. § 8101(4).

[9] The Board notes that the weekly pay rate of $418.02 is inconsistent with the memorandum accompanying the decision which indicated that appellant's average weekly pay rate between May 23 and August 11, 1991 was $438.92 per week. In addition, appellant's weekly pay rate for the month preceding his recurrence was $462.83.

[10] *Cf. Ralph W. Moody*, 42 ECAB 364 (1991).

consequence that flows from the injury likewise arises out of the employment."[11] With regard to consequential injuries, the Board has stated that where an injury is sustained a consequence of an impairment residual to an employment injury, the new or second injury is deemed because of the chain of causation, to arise out of and be in the course of employment.[12]

In this case, appellant did not file a specific claim for his hernia condition. Rather, he mentioned the condition to his rehabilitation counselor while he was in a rehabilitation training school as an excuse for absences in November 1994. When the Office requested that appellant submit medical evidence to support the excuse of his absence from the training program, he submitted a medical report by Dr. Richard Leber, which indicated that the hernia condition was not industrial. Thus, appellant has not submitted any evidence which provides a causal relationship between his hernia condition and his accepted employment injury. Similarly, while appellant indicated that he wanted to file a "stress" claim on or about February 22, 1995 and submitted an office note and form report which indicated that he had anxiety attacks and chronic anxiety, he did not submit any evidence to establish a causal connection between the claimed stress and his accepted employment injury. Therefore, appellant has not established that he sustained either aggravation of his hernia condition or an emotional condition as a consequence injury of his accepted respiratory employment injury.

The Board also finds that the Office properly denied appellant's request for relocation expenses.

Section 8103 of the Act provides that an employee who is injured while in the performance of duty shall be furnished with "the services, appliances, and supplies prescribed or recommended by a qualified physician which the Secretary of Labor considers likely to cure, give relief, reduce the degree of the period of disability, or aid in lessening the amount of the monthly compensation."[13] It is also recognized that, in the absence of an emergency, an employee may not recover the costs of medical services, appliances or supplies without prior approval by the Office.[14] Although appellant advised the rehabilitation services that he wanted to move to Oregon in February 1994 and pursue a rehabilitation direct job placement plan there rather than in the California area, appellant did not request approval for the move to Oregon. In addition, there is no evidence that this move constituted an emergency and appellant did not relocate to accept an offer of suitable work. Therefore, his relocation costs are not covered under section 10.123(f) of the implementing regulations.[15] Accordingly, the Office properly denied appellant request for relocation expenses.

The decision of the Office of Workers' Compensation Programs dated January 11, 1996 is hereby affirmed in part and is set aside with respect to the issues of wage-earning capacity and

[11] A. Larson, *The Law of Workers' Compensation* § 13.00.

[12] *Merlind K. Cannon*, 46 ECAB 581 (1995); *Margarette B. Rogler*, 43 ECAB 1034 (1992).

[13] 5 U.S.C. § 8103(a).

[14] *Fannie V. Williams*, 33 ECAB 800 (1982).

[15] 20 C.F.R. § 10.123(f).

pay rate. The case is remanded for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
January 20, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member