U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL E. GRAY and DEPARTMENT OF THE NAVY, NAVAL AIR STATION, Pensacola, FL

Docket No. 97-2624; Submitted on the Record;
Issued January 4, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM, A. PETER KANJORSKI

The issues are: (1) whether appellant has established greater than a three percent permanent impairment, for which he received a schedule award; (2) whether the Office of Workers' Compensation Programs properly determined that appellant's actual earnings as a quality assurance specialist fairly and reasonably represented his wage-earning capacity; (3) whether the Office properly denied merit review of appellant's schedule award pursuant to section 8128 of the Federal Employees' Compensation Act; and (4) whether the Office properly denied appellant's request for a hearing pursuant to section 8124 of the Act.

On October 30, 1989 appellant, then a 46-year-old quality assurance specialist, filed a notice of traumatic injury and claim, alleging that he sustained injuries as a result of "horseplay" on October 27, 1989. Appellant stopped work. The Office accepted appellant's claim for lumbar strain with nerve root irritation and aggravation of degenerative arthritis in the spine. Appellant returned to work in a limited-duty position as a quality assurance specialist in 1990. By letter dated January 19, 1995, the employing establishment notified appellant that it would be undergoing a reduction-in-forces and that he would be released from his competitive service position. On March 28, 1995 appellant accepted a position as a quality assurance specialist with a change in grade to GS-9 but with retained salary at his previous level. Effective September 30, 1995, appellant's position was terminated due to ongoing reduction-in-forces personnel actions.

On February 11, 1997 appellant filed a claim for a schedule award and a claim for continuing compensation.[1] In a decision dated April 30, 1997, the Office awarded appellant a schedule award for a 3 percent permanent impairment of his right leg for a total of 8.64 weeks of compensation from February 21 to April 22, 1997. In a decision dated June 14, 1997, the Office issued a retroactive loss of wage-earning capacity determination, finding that appellant's employment as a limited-duty quality assurance specialist fairly and reasonably represented his

[1] On February 24, 1997 appellant filed an occupational disease claim. The Office combined this claim with appellant's prior claim in July 1997.

wage-earning capacity. By decision dated June 25, 1997, the Office denied merit review of appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to reopen the record. In a decision dated August 12, 1997, the Office denied appellant's request for a hearing.

The Board has duly reviewed the entire case record on appeal and finds that appellant has not established greater than a three percent permanent impairment for which he received a schedule award.

Section 8107 of the Act[2] and its implementing regulation[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of specified members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) have been adopted by the Office, and the Board has concurred in such adoption, as an appropriate standard for evaluating losses.[4]

In the present case, the Office developed evidence relevant to the schedule award issue by requesting that appellant's treating physician, Dr. Amos L. Prevatt, provide an impairment rating in relation to appellant's accepted employment injuries. Appellant responded and requested that the Office seek the impairment rating from Dr. William A. Crotwell, III, a Board-certified orthopedic surgeon and Office referral physician. In a report dated February 21, 1997, Dr. Crotwell noted that he had received the request for an impairment rating by the Office and advised that appellant had a three percent permanent impairment of the right lower extremity based on his review of the 4th edition of the A.M.A., *Guides*. Specifically, under Table 83 of the A.M.A., *Guides*, appellant had a 5 percent impairment of the right lower extremity due to pain from the L5 nerve root; his pain was Grade 3, according to Table 11 and his 5 percent pain multiplied by 60 percent, the Grade 3 multiplier, resulted in a total permanent impairment of 3 percent. This report was reviewed by a district medical adviser who concurred with Dr. Crotwell's assessment that appellant had sustained a three percent permanent impairment of his right lower extremity. The Board further notes that, while appellant has repeatedly asserted that he should receive a schedule award for his back, as he and Dr. Prevatt were advised, the Act does not provide for schedule awards for impairment for the back as this is not a covered member. Therefore, the medical evidence of record does not establish that appellant sustained greater than a three percent permanent impairment of his right lower extremity.

The Board also finds that the Office properly determined that appellant's position as a quality assurance specialist fairly and reasonably represented his wage-earning capacity and, therefore, he had no loss of wage-earning capacity.

[2] 5 U.S.C. § 8107(c).

[3] 20 C.F.R. § 10.304.

[4] *Quincy E. Malone*, 31 ECAB 846 (1980).

It is well established that once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[5] After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not reduce compensation without establishing that the disability ceased or that it is no longer related to the employment. Section 8115(a) of the Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.[6] Generally, 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.[7]

In this case, appellant returned to work in 1990 in a quality assurance specialist position with restrictions. He worked in this position until it was terminated due to a reduction-in-forces effective September 30, 1995. Moreover, although this position was reclassified as a GS-9 position in March 1995, appellant retained his prereduction-in-forces salary as a GS-11 Step 8.

The Office procedure manual sets forth the procedures for determining entitlement to compensation after reemployment and for determining wage-earning capacity. If a loss of wage-earning capacity determination has not been made and the claimant, as in this case, worked in the position for at least 60 days, the claims examiner is directed to consider a retroactive wage-earning capacity determination. "A retroactive decision may be made if: (1) The claimant has worked in the position for 60 days; (2) The claims examiner has determined that the employment fairly and reasonably represents the wage-earning capacity; and (3) The work stoppage did not occur because of any change in the claimant's injury-related condition affecting ability to work."[8] The procedure manual further provides that if a reemployed claimant faces removal from employment due to a true reduction-in-force which affects full duty and no formal findings of loss of wage-earning capacity has been made, a retroactive loss of wage-earning capacity determination should be considered.[9]

Therefore, in this case where appellant worked in the designated position for over 60 days; and there is no evidence that the position did not fairly and reasonably represent appellant's wage-earning; and his work stoppage was not related to accepted employment injury or any disability therefrom, the Office properly determined retroactively that appellant's position as a quality assurance specialist fairly and reasonably represented his wage-earning capacity and further permissibly determined that there was no loss of wage-earning capacity as appellant retained his pay rate throughout all reduction-in-forces proceedings.

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[5] *See Lawrence D. Price*, 47 ECAB 120 (1995); *Charles E. Minniss*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[6] 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

[7] *Hubert F. Myatt*, 32 ECAB 1994 (1981).

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.812.12(b); *see also* Chapter 2.814.7(c) (December 1993) and 2.814.7(e) (May 1997).

[9] *Supra* at Chapter 2.814.12.

The Board further finds that the Office properly denied appellant's request for reconsideration.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of his claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these requirements, the Office will deny the application for review without reviewing the merits of the claim.[10] Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.[11] Evidence that does not address the particular issue involved does not constitute a basis for reopening a case.[12]

By letter received June 17, 1997, appellant requested reconsideration of the Office's April 30, 1997 decision finding that he was entitled to a three percent schedule award for impairment of his right lower extremity. On reconsideration appellant argued that he should receive a schedule award for permanent disability to his back and that he had sustained a loss of wage-earning capacity as he could no longer perform his old job. Appellant resubmitted Dr. Crotwell's February 21, 1997 medical report. As discussed *infra*, appellant was advised previously that the back is not a covered member for schedule award purposes under the Act. Consequently, this argument is repetitious and cannot provide a basis for reopening the record. In addition, the report by Dr. Crotwell was previously considered by the Office and provided the basis for the schedule award that appellant did receive. As this evidence is duplicative, it is not sufficient to establish that merit review is warranted. Finally, appellant's argument that he could not perform his "old job" is without merit as discussed above in relation to the Board's finding that the Office's wage-earning capacity determination was appropriate. Appellant has not established a basis for reopening the record and the Office properly denied his request for reconsideration.

Finally, the Board finds that the Office properly denied appellant's request for a hearing pursuant to section 8124 of the Act.

Section 8124(b)(1) of the Act provides: "Before review under section 8128 of this title, a claimant for compensation not satisfied with the decision of the Secretary ... is entitled, on request a made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary."[13] Thus, appellant must request a hearing within the provided time limitation before he requests reconsideration or he is not entitled to a hearing as a matter of right.[14] In this case, appellant requested and a decision was issued in relation to

[10] 20 C.F.R. § 10.138(b)(2).

[11] *Sandra F. Powell*, 45 ECAB 877 (1994); *Eugene F. Butler*, 36 ECAB 393 (1984); *Bruce E. Martin*, 35 ECAB 1090 (1984).

[12] *Dominic E. Coppo*, 44 ECAB 484 (1993); *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

[13] 5 U.S.C. § 8124(b)(1).

[14] *See Mary G. Allen*, 40 ECAB 190 (1988).

his request for reconsideration prior to his filing a request for a hearing. Therefore, appellant is not entitled to hearing as a matter of right. The Office properly exercised its discretionary authority and advised appellant additional evidence not previously considered could be submitted with a request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated August 12, June 25 and 14 and April 30, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 4, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member