U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LEWIS MORROW and DEPARTMENT OF THE NAVY,
U.S. NAVAL AVIONICS FACILITY, Indianapolis, IN

Docket No. 98-473; Submitted on the Record;
Issued May 5, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in reducing appellant's wage-loss compensation.

On April 2, 1974 appellant, then a 44-year-old machine parts inspector, was injured in the performance of duty when he was struck by a truck and knocked six feet, landing on his back on the cement. He was initially treated at sick bay and sent home for four days. When he returned to work, he complained of continuing back, neck and left arm pain and was eventually seen by a Board-certified orthopedic surgeon, Dr. Clinton W. Wainscott, who prescribed a back brace and later had appellant hospitalized for traction and physical therapy. The Office accepted appellant's traumatic injury claim for low back sprain, lumbar facet syndrome, sciatica and permanent aggravation of spondylolisthesis.[1] Appellant worked intermittently in the months following his work injury but stopped work entirely on September 5, 1974.[2]

The record indicates that x-rays of the lumbar spine revealed degenerative facet sclerosis particularly at L5 on the right and a cervical spine film showed some mild degenerative changes. Appellant underwent a lumbar facet rhizotomy on March 5, 1975 and a repeat facet rhizotomy on the right at L4-5 and L5-S1 on July 2, 1976. Appellant has also received numerous epidural injections over the years for relief of his back pain.

In a report dated January 26, 1977, Dr. Rudolph Rouhana, a Board-certified family practitioner, noted that appellant had been his patient since November 1975 secondary to a work

[1] The Office stated, in a statement of accepted facts dated April 16, 1996, that concurrent conditions found not to be work related are arthritis, headaches, lightheadedness, dizziness, spondylolisthesis, degenerative changes at C5-6, C6-7 and anxiety.

[2] Appellant was placed on the permanent rolls until February 13, 1976, when he returned to pay status in order to use sick leave before his retirement. Appellant's sick leave expired on March 25, 1976 and he elected to receive Federal Employees' Compensation Act benefits as opposed to Civil Service Retirement benefits.

injury in 1974. Dr. Rouhana advised that he treated appellant five or six times per year for back, shoulder and joint pain, for which he was prescribed analgesics and muscle relaxants. He diagnosed lumbar facet syndrome, sciatica and arthritis due to appellant's work injury and stated that appellant's pain prevented him from doing any lifting or straining. Dr. Rouhana further opined that appellant was unable to sit or stand for any length of time. He, therefore, considered appellant to be totally disabled from gainful employment.

Dr. Rouhana prepared similar reports indicating that he treated appellant five or six times a year for back and shoulder pain, which he considered to be a chronic condition. Those reports are dated intermittently between 1977 and 1996. He maintained that appellant was unable to work.

In a report dated December 2, 1982, Dr. Larry D. Olson, an Office referral physician and Board-certified physician, diagnosed that appellant suffered from degenerative disc disease at C5-6 and C6-7 with spondylolistheses of the lumbosacral spine. He thought it was feasible for appellant to perform sedentary work although the employing establishment did not have such work available.

In an April 25, 1993 report, Dr. John E. Young, a Board-certified orthopedic surgeon, advised that appellant was examined on April 15, 1983 for complaints of low back pain with sharp pain radiating down to his right heel. He also noted that appellant had some difficulty with neck pain in the cervical region and radiation into the left arm. According to Dr. Young, x-rays showed "considerable amount of facetal arthritis in the lower lumbar region with a right pars interarticularis defect and a first degree spondylolisthesis." He noted marked limitation in straight leg raising and opined that appellant remained totally disabled with no improvement in his back condition. Dr. Young referred appellant for pain management where he was given a transcutaneous electrical nerve stimulation unit.

The Office next referred appellant for an examination with Dr. Donald S. Blackwell on October 17, 1993. In a report dated October 23, 1993, Dr. Blackwell discussed appellant's work injury and subsequent medical treatment. He noted on physical examination that appellant had considerable restriction of motion in the lower back, about 50 percent of normal. Dr. Blackwell reviewed x-rays dated April 15, 1983 and stated:

> "[Appellant] has a spondylolisthesis of the fifth lumbar vertebra with lumbosacral instability and constant and unrelieved low back pain.… In talking with him, what I can gather is debatable as to whether or not this is degenerative or developmental in nature with aggravation by the trauma he has received. One can only go by the history in that he apparently was getting along well at the time of his injury. Subsequent to this, he has had constant and unrelieved problems. One would assume that he has had progressive instability associated with the injury even if he did have a previous preexistent weakness in the area."

Dr. Blackwell concluded that appellant would never be able to work in the type of job he previously held or any job that might involve any sort of heavy activity, bending, stooping, or being on his feet for a prolonged period of time.

In a supplemental report dated December 11, 1993, Dr. Blackwell responded to an Office inquiry regarding the causal relationship between appellant's work injury and his continuing back condition. He stated that appellant's back symptoms were the result of an aggravation of a preexisting degenerative back condition caused by his work injury. Dr. Blackwell opined that the aggravation was permanent in nature and would prevent appellant from returning to productive work activities as he discussed in his previous report.

In a report dated February 12, 1996, Dr. Rouhana stated that appellant had been under his care for lumbar facet syndrome, sciatica and spondylolisthesis of the fifth lumbar vertebrae resulting in instability and constant pain in the lower back, right hip and right leg. He noted that appellant was in constant pain in the left arm and shoulder due to an April 2, 1974 work injury. Dr. Rouhana stated that appellant was incapable of doing any lifting, bending, stooping or sitting/standing for any length of time.

The Office referred appellant, along with a statement of accepted facts and a copy of the record, to Dr. Arthur Lorber, a Board-certified orthopedic surgeon, for a second opinion evaluation on April 25, 1996. In an April 29, 1993 report, Dr. Lorber noted appellant's history of injury, subjective complaints and physical findings. He reported that appellant suffered from chronic complaints of cervical discomfort with probable congenital block vertebra at C6-7, but no objective evidence of cervical myopathy or radiculopathy; chronic complaints of left shoulder pain with possible impingement and rotator cuff tendinitis; chronic low back pain and right sciatica consistent with spondylolisthesis and suggestion of minimal right lumbar root irritation; chronic depression. Dr. Lorber opined that appellant was partially disabled and capable of performing sedentary activities, "not requiring prolonged standing, repeated bending, lifting over 10 pounds, climbing, etc."[3]

In an OWCP-5 work evaluation form dated May 8, 1996, Dr. Lorber reported that appellant could work 8 hours per day with no lifting over 10 pounds, no prolonged standing or repeated bending, no limitations of the upper extremities. He specifically noted that there were no limitations of the upper extremities and that appellant could perform repetitive motions of the wrists and hands.

The Office referred appellant for vocational rehabilitation based on Dr. Lorber's work-evaluation reports. Thomas Roundtree, a rehabilitation counselor, prepared a report on November 12, 1996, in which he recommended that the Office proceed to determine appellant's current wage-earning capacity based upon his ability to perform a job as an "Assembler, DOT 726-6840034." An Office job classification form completed for the position of assembler indicated that the job was sedentary and fell within the work restrictions provided by the Office referral physician.

[3] In a May16, 1996 supplemental report, Dr. Lorber stated that there was a permanent aggravation of appellant's spondylolisthesis causally related to the accepted work injury. He further stated that appellant's subjective complaints were substantiated by a positive sitting root test on the right and a positive right leg-raising test. Dr. Lorber concluded that appellant's chronic complaints were compatible with spondylolisthesis.

In a December 23, 1996 report, Dr. Rouhana reiterated his opinion that appellant was disabled by all work due to his history of back and shoulder pain, along with additional medical problems and age. He did not indicate whether he had recently examined appellant, nor did he provide any rationale for his opinion.

On January 13, 1997 the Office issued a "Notice of Proposed Reduction of Compensation" based on appellant's capacity to perform the position of assembler.[4] Appellant was provided 30 days in which to submit additional evidence or argument relevant to his capacity to earn wages in the position described.

In a letter received by the Office on February 3, 1997, appellant stated that he wished to appeal the proposed termination. Appellant also informed the Office that he had scheduled a medical appointment with an orthopedic specialist for February 5, 1997.[5]

In a decision dated February 14, 1997, the Office reduced appellant's compensation based on a finding that he had the wage-earning capacity of an assembler.

The Board finds that the Office erred in reducing appellant's compensation because there is a conflict in the medical evidence as to whether the position of "assembler" represents appellant's wage-earning capacity[6] or whether he remains totally disabled for all work activity.

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.[7] If an employee's disability is no longer total, but the employee remains partially disabled, the Office may reduce compensation benefits by determining the employee's wage-earning capacity.[8] 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.[9]

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[4] In an accompanying memorandum, the Office indicated that appellant had worked with a rehabilitation counselor in securing employment and the counselor had advised that the position of assembler was available in appellant's commuting area at a pay rate of $5.50 per hour. The Office further indicated that the position of assembler, number 726.684-034 in the *Dictionary of Occupational Titles*, fairly and reasonably represented appellant's wage-earning capacity.

[5] The Office did not receive a medical report relevant to that scheduled examination within the 30-day period allotted.

[6] Appellant submitted evidence subsequent to the Office's February 14, 1997 decision, however, the Board does not have jurisdiction to consider evidence that was not before the Office at the time it issued its final decision; *see* 20 C.F.R. § 501.2(c).

[7] *Gary R. Sieber*, 46 ECAB 215 (1994).

[8] 20 C.F.R. § 10.303(a).

[9] *See James R. Verhine*, 47 ECAB 460 (1996); 5 U.S.C. § 8115(a).

In the instant case, the Office relied on the opinion of the Office referral physician, Dr. Lorber, in determining appellant's work restrictions. He specifically opined that appellant could perform sedentary work and the Office applied Dr. Lorber's work restrictions in concluding that appellant could perform the job requirements of an assembler. Based on the description of the assembler job in conjunction with the report of Dr. Lorber, the Office reached a wage-loss capacity determination and reduced appellant's wage-loss compensation benefits. The Office, however, ignored the numerous and contemporaneous reports of record from appellant's treating physician, Dr. Rouhana, which stated that appellant was unable to perform any work whatsoever. The fact that appellant has been receiving compensation for approximately 22 years based in part on the intermittent reports of Dr. Rouhana indicates that the Office at one time considered his opinion to be sufficiently reasoned to award benefits. The Board finds that there is a conflict in the medical opinion evidence between Dr. Rouhana's opinion that appellant is totally disabled from gainful employment and Dr. Lorber that appellant is capable of performing sedentary work.

Section 8123(a) of the Federal Employees' Compensation Act provides that, "If there is 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."[10] As there is an existing conflict of medical opinion evidence as to the nature and extent of appellant's disability for work and the specific physical restrictions applicable to appellant's back condition, the Board finds that the Office failed to carry its burden of proving in reducing appellant's wage-loss compensation.

[10] 5 U.S.C. § 8123.

The decision of the Office of Workers' Compensation Programs dated February 14, 1997 is hereby reversed.

Dated, Washington, D.C.
May 5, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member