

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHNNY L. WILSON and U.S. POSTAL SERVICE,
POST OFFICE, Baton Rouge, LA

*Docket No. 98-2536; Submitted on the Record;
Issued February 13, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue are: (1) whether appellant has established that his loss of wage-earning capacity as a general clerk should be modified; and (2) whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On January 18, 1986 appellant, then a 44-year-old letter carrier, filed a claim for an occupational disease alleging that he sustained bone spurs in his right and left ankles, shin splints and pain in his legs while in the performance of duty.¹ The Office accepted that he sustained an aggravation of degenerative arthritis of both ankles, shin splints and a lumbosacral strain. Appellant returned to work in a limited-duty capacity as a general clerk under recommendations by his attending physician, Dr. Charles S. Kennon, an orthopedic surgeon. Appellant received compensation for intermittent periods of disability from February 28, 1986 to August 28, 1987.

Appellant filed a claim for a schedule award for impairment of the right and left lower extremities. He received compensation under a February 16, 1988 schedule award for 10 percent impairment of the left lower extremity and 14 percent impairment of the right lower extremity. The period of the schedule award ran from January 1, 1988 through May 5, 1989. Appellant returned to limited-duty work during the schedule award period as a general clerk answering telephone calls and sorting mail. On September 25, 1992 he elected benefits from the Office of Personnel Management (OPM) under the Civil Service Retirement Act (CSRA) in lieu of wage-loss benefits under the Federal Employees' Compensation Act.

By letter dated January 22, 1996 appellant advised the Office that, since his retirement, he had worked at several part-time jobs to supplement his income. He indicated that he had submitted several employment applications to private companies within his work tolerance

¹ Appellant previously sustained injury on June 30 and December 29, 1979, accepted for a lumbosacral strain. Conditions not accepted as employment-related consist of cervical spondylosis and neck fusion.

limitations and requested compensation be paid until he was accepted for employment or retrained in computer technology. On January 23, 1996 appellant submitted a CA-7 claim for compensation.

In a February 29, 1996 response, the Office advised appellant that at the time he elected his OPM retirement annuity he was receiving compensation at a reduced rate based on his actual earnings with his employer. The Office indicated that, if appellant elected benefits under the Act, his entitlement would be the amount he received under the loss of wage-earning capacity or the amount received at the time he elected annuity benefits. In a March 4, 1996 response, appellant requested to “revert” to workers’ compensation and information by which he could make an election of benefits.

By decision dated May 29, 1996, the Office found that appellant’s wage-earning capacity was represented by the position of limited-duty general clerk. He was apprised that he was entitled to compensation in the amount of \$1,409.00 every four weeks and to make an election between benefits under the Act and his entitlement under the CSRA.

On June 4, 1996 appellant elected benefits under the Act, the effective date being listed as that date. On June 27, 1996 the Office notified the OPM of appellant’s election and requested the date the OPM annuity would be suspended. On July 18, 1996 OPM advised that appellant would be paid through June 30, 1996 and would transfer enrollment for health and insurance effective July 1, 1996.²

By letter dated January 8, 1997, appellant requested modification of the Office’s May 29, 1996 decision. He submitted the October 28, 1996 report of Dr. Stephen J. Flood, an orthopedic surgeon, concerning cervical spine symptoms affecting appellant’s neck and right arm.³ Dr. Flood reviewed a history of appellant’s back and ankle condition, noting appellant’s treatment by Dr. Kennon. Dr. Flood indicated that, while appellant missed some time from work in the 1970s and 1980s, he was always able to get back working at the employing establishment. He stated that appellant reported an on-the-job motor vehicle accident in “1977” with treatment by Dr. Kennon. Dr. Flood noted that, “[b]ecause it had never been authorized, there were no reports regarding it.” He indicated that in 1992 appellant experienced increasing neck symptoms. Dr. Flood reviewed appellant’s diagnostic testing between 1988 and 1995, stating that there was disc bulging at L3-4 and L4-5 with no evidence of any focal herniation. He obtained x-rays, which revealed “either congenital fusion or lack of segmentation at C3-4.” Dr. Flood noted appellant appeared to once have a disc space at C5-6 but there was a massive osteophyte formation which had gone on to a very significant spontaneous fusion. He concluded: “I would have difficulty tying [appellant’s] current neck problems into the motor vehicle accident back in 1977.” He indicated that repetitive looking up and down in the 1980’s and 1990’s could have aggravated his neck condition.

By decision dated March 3, 1997, the Office denied appellant’s request for modification of the May 29, 1996 wage-earning capacity decision. The Office noted that, before it could

² In a July 30, 1996 addendum, it was noted that appellant’s case had also been accepted for sacroiliac strain.

³ On October 29, 1996 the Office authorized treatment by Dr. Flood.

resume payment of compensation benefits, appellant's entitlement had to be determined. The Office noted that Dr. John R. Montz, a Board-certified orthopedic surgeon selected as an impartial medical specialist, had examined appellant on May 28, 1991 and found him capable of full-time limited duty as a general clerk subject to listed physical restrictions. For this reason, the Office reinstated compensation based on the general clerk position. The Office noted that the report of Dr. Flood pertained to treatment of appellant's neck, a condition not accepted as work related.⁴ The Office stated that, while preexisting conditions are to be considered in determining an employee's wage-earning capacity, the medical evidence submitted did not establish that appellant had been unable to perform the duties of general clerk due to his cervical symptoms.

In a letter dated September 30, 1997, appellant requested reconsideration, contending that his wage-earning capacity had been made in error. He submitted evidence pertaining to a 1974 motor vehicle accident, treatment notes of Dr. Kennon and the May 28, 1991 report of Dr. Montz. A June 11, 1991 report of Dr. Kennon noted appellant's history of a 1974 motor vehicle accident. He stated that in 1977 he treated appellant for neck complaints, noting a fused vertebra at the C3-4 level that was congenital in origin and degenerative disc disease at the lower cervical levels. Dr. Kennon did not find appellant totally disabled for work due to his cervical condition and did not address whether appellant's employment activities caused or aggravated his neck condition.

In a January 15, 1998 decision, the Office denied modification of its prior decisions. The Office noted that the accident report showed that appellant was involved in a motor vehicle accident in 1974, but that the Office had denied his neck injury claim in June 1994. In reviewing the evidence from Dr. Kennon, the Office noted that appellant's attending physician had not found appellant disabled for work due to his neck symptoms during the time he treated appellant or at any time prior to appellant's retirement in 1992. It was noted that Dr. Flood did not begin to treat appellant until 1996, following Dr. Kennon's retirement in 1995, and he did not address the issue of whether appellant was disabled from performing work as a limited-duty general clerk.

Appellant again requested reconsideration of the Office's decision, submitting copies of medical reports of record.

In a decision dated June 11, 1998, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was previously of record and appellant failed to advance legal contentions not previously considered.

The Board finds that appellant has not established that his wage-earning capacity should be modified.

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there was a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated,

⁴ In a June 5, 1997 letter, the Office noted that appellant's claim in No. 16-197995 for cervical spondylolysis and fusion of the neck was denied in 1994 and retired to the Federal Records Center.

or the original determination was, in fact, erroneous.⁵ The burden of proof is on the party attempting to show that the award should be modified.⁶

The record reveals that, following the acceptance of his claim for an aggravation of degenerative disease of his low back and ankles, appellant received appropriate compensation benefits for intermittent periods of total disability. He was treated by Dr. Kennon, his attending orthopedic surgeon, who found that appellant was able to perform work as a limited-duty general clerk within specified physical limitations. While Dr. Kennon noted treating appellant for neck complaints, he did not find that appellant was ever disabled for work due to his neck symptoms or address how appellant's cervical condition was caused or aggravated by his limited-duty work.

In 1990 a conflict in medical opinion arose as to the number of hours appellant was able to work in his limited-duty capacity. Based on this conflict, he was referred to Dr. Montz, a Board-certified orthopedic surgeon selected as the impartial medical specialist. In a May 28, 1991 report, Dr. Montz examined appellant and reviewed diagnostic testing. He noted appellant had been treated conservatively and extensive diagnostic tests, including myelogram, computerized axial tomography (CAT) scan and nerve conduction studies, ruled out a herniated lumbar disc. Dr. Montz found x-ray evidence of osteophytes on the dorsal aspect of the talus with minimal degenerative changes of the lumbar discs or facet joints. He found that appellant was capable of continuing work as a limited-duty general clerk full time. In a March 17, 1992 medical report, Dr. Montz reiterated that appellant could perform limited duties on a full-time basis. The record establishes appellant continued in his employment as a limited-duty general clerk until September 25, 1992 when he elected OPM retirement benefits in lieu of wage-loss compensation benefits.⁷

In 1996, with appellant's election to resume compensation benefits under the Act, the Office followed its procedures to obtain information as to the effective date of the suspension of OPM retirement benefits, the transfer of health benefit and insurance enrollment and the determination of appellant's rate of compensation.⁸ As appellant had been working limited duty at the time he elected OPM retirement benefits in 1992 and held private employment during a portion of his retirement, the Office followed its procedures to ascertain appellant's wage-earning capacity based on the limited-duty general clerk position held prior to retirement.⁹ As no formal wage-earning capacity decision had been issued prior to his retirement, the Office reviewed the evidence pertaining to appellant's partial disability and found that he was capable of working in the limited-duty general clerk position on a full-time basis. This was formalized in the May 29, 1996 decision when the Office advised appellant of his entitlement to wage-loss

⁵ See *Joseph M. Popp*, 48 ECAB 624 (1997); *Jack E. Rohrabaugh*, 38 ECAB 186 (1986).

⁶ *Id.*

⁷ Appellant retired before the Office could complete a formal loss of wage-earning capacity determination.

⁸ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000 (February 1995).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8f (December 1993).

compensation benefits in the amount of \$1,409.00 every four weeks. Appellant elected Act benefits on June 4, 1996 and his OPM retirement annuity was suspended effective June 30, 1996.

Commencing January 8, 1997 appellant has sought modification of his wage-earning capacity. As noted above, it is appellant's burden of proof to establish that modification is warranted by showing a material change in the nature and extent of his injury-related condition, that he has been retrained or otherwise vocationally rehabilitated, or that the original determination was, in fact, erroneous.

Appellant has failed to establish that there has been a material change in the nature and extent of his injury-related condition. The medical evidence submitted by him does not establish that his accepted ankle and low back conditions have worsened from partial disability or caused total disability for work. Nor has appellant established that the wage-earning capacity was in error. He submitted the report of Dr. Flood pertaining to treatment of a cervical condition affecting appellant's neck and right arm. Dr. Flood noted that he treated appellant's low back with a sacroiliac (SI) joint injection, which relieved appellant's symptoms. He noted appellant was retired from the employing establishment and that he would encounter difficulty in driving a truck for mail delivery, standing or walking. Dr. Flood, however, did not address the limited-duty job activities appellant was performing prior to retirement or provide any opinion discussing how appellant's back or ankle conditions had worsened giving rise to total disability. With regard to appellant's cervical symptoms, Dr. Flood merely noted that he had "difficulty tying [appellant's] current neck problems into the motor vehicle accident," indicating that repetitive looking up and down "could have aggravated the problem that he got from the motor vehicle accident." The Board finds that his medical opinion on the causal relationship of appellant's cervical condition to his employment is speculative in nature and of diminished probative value. Dr. Flood failed to provide a complete and accurate history of appellant's injury, demonstrate knowledge of the limited duties he performed prior to retirement or provide an opinion based on reasonable medical certainty.¹⁰

Appellant alleged error on the part of the Office in not considering his cervical condition in his wage-earning capacity determination. It is well established that in determining loss of wage-earning capacity, where residuals of an accepted condition prevent an employee from performing his regular duties, physical ailments which preexisted the accepted condition must be taken into consideration when selecting a job for purposes of determining wage-earning capacity. Physical ailments acquired subsequent to and unrelated to the accepted injury are excluded from consideration.¹¹ The medical evidence submitted by appellant demonstrates that Dr. Kennon

¹⁰ See *Connie Johns*, 44 ECAB 560 (1993). (Medical reports from a physician who supported causal relationship only by noting that the employment injury "could have" caused an aggravation of disc degeneration without supporting rationale was speculative and inconclusive in nature.)

¹¹ See *John A. Zibutis*, 33 ECAB 1879 (1982).

started treating him for cervical complaints in 1977 following a motor vehicle accident in 1974.¹² However, his medical reports through the 1980's and early 1990s establish that he did not ever find appellant totally disabled for work as a limited-duty general clerk due to his neck condition. Nor did Dr. Kennon provide any opinion relating any aggravation of appellant's cervical symptoms to the limited duties which appellant was assigned. His reports are insufficient to establish that appellant's wage-earning capacity as a limited-duty clerk was impacted by his preexisting neck condition. Dr. Flood's reports, commencing in 1996, are similarly deficient in addressing the issues of causal relationship and total disability for work due to appellant's cervical complaints. For this reason, the Office properly advised appellant that his neck condition was not considered a factor in determining his wage-earning capacity.

The Board finds that the Office properly denied appellant's request for reconsideration on June 11, 1998.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹³ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; or (2) advance a point of law or fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.¹⁴ When a claimant fails to meet any of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under the Act.¹⁵

In 1998 appellant requested reconsideration of his claim, contending that he still suffered from neck, back, leg and foot injuries sustained at work. Through his congressional representative, appellant submitted medical, physical therapy and informational materials previously of record. The Board notes that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a claim.¹⁶ The medical evidence submitted by appellant is duplicative of the reports from his physicians already of record. The materials pertaining to the limited-duty clerk position appellant held at the employing establishment are also duplicative in nature. Moreover, this evidence does not address the relevant issue in this case, *i.e.*, whether appellant has established a material change in his injury-related conditions or error in the Office's wage-earning capacity determination. The submission of evidence which does not address the particular issue involved does not constitute a

¹² The record indicates that the Office secured the June 3, 1994 report of a Dr. Cobb, an attending physician, who opined that any aggravation to appellant's cervical condition caused by his mail carrying would be temporary in nature and ceased when he stopped mail delivery. Dr. Cobb stated: "He apparently would be able to do a lesser job and, therefore, the aggravation from carrying the mail will have ceased...." As appellant returned to a limited-duty capacity on June 1, 1991 which did not require mail delivery or carrying mail, any aggravation of his cervical condition ceased as of that date.

¹³ 5 U.S.C. § 8128(a).

¹⁴ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

¹⁵ See *Roseanne S. Allexenberg*, 47 ECAB 498 (1996).

¹⁶ *Id.*; see also *Eugene F. Butler*, 36 ECAB 393 (1984).

basis for reopening a claim for reconsideration of the merits.¹⁷ Appellant has not established that the Office abused its discretion by denying his request for review.

The decisions of the Office of Workers' Compensation Programs dated June 11 and January 15, 1998 are affirmed.

Dated, Washington, DC
February 13, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

¹⁷ See *Edward Matthew Diekemper*, 31 ECAB 224 (1979).