U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD GARCIA and DEPARTMENT OF THE AIR FORCE, LACKLAND AIR FORCE BASE, TX

Docket No. 99-950; Submitted on the Record;
Issued February 20, 2001

DECISION and ORDER

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

The issues are: (1) whether appellant has established that a February 11, 1992 loss of wage-earning capacity determination should be modified; (2) whether appellant has established an emotional condition casually related to a November 15, 1988 employment injury; and (3) whether the Office of Workers' Compensation Programs properly denied authorization for back surgery.

In a prior appeal, the Board set aside a March 24, 1994 Office decision and remanded the case for further development on the issue of modification of the wage-earning capacity determination.[1] The history of the case is contained in the Board's prior decision and is incorporated herein by reference.

In a decision dated April 2, 1998, the Office denied modification of the February 11, 1992 wage-earning capacity determination. The Office also denied authorization for back surgery. By decision dated October 8, 1998, an Office hearing representative affirmed the April 2, 1998 decision. The hearing representative also affirmed an October 30, 1996 Office decision, finding that appellant had not established an emotional condition causally related to a November 15, 1988 employment injury.

The Board has reviewed the record and finds that the February 11, 1992 wage-earning capacity determination was erroneous and, therefore, must be modified.

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

[1] Docket No. 95-120 (issued October 17, 1997).

rehabilitated, or the original determination was, in fact, erroneous.[2] The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.[3]

A review of the record indicates that appellant returned to work on August 19, 1991, at four hours per day in a light-duty position. In a decision dated November 26, 1991, the Office determined that appellant's actual earnings of $243.00 per week ($12.15 per hour) represented his wage-earning capacity.

The February 11, 1992 decision, however, states that appellant had been reemployed as a supply clerk with wages of $364.50 per week since February 3, 1992. This represents an hourly wage of $12.15 at 30 hours per week, or six hours per day. The Office's statement of accepted facts clearly states that appellant had never actually worked six hours per day prior to February 11, 1992; he had been released to work six hours per day as of February 3, 1992, but did not actually work at all from February 3, 1992.[4] The Office, therefore, erroneously attempted to make a wage-earning capacity determination based on actual earnings that appellant had not actually earned. Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity.[5] The Office did not use actual wages received and accordingly the Board finds that the February 11, 1992 wage-earning capacity determination was erroneous. As noted above, a claimant has established that modification is warranted if the original determination was erroneous.

Appellant had returned to work at four hours per day from August 1991 to February 1992. Based on the Board's findings with respect to the February 11, 1992 Office decision, appellant would remain entitled to four hours of compensation per day until November 1992, when he began working six hours per day. To the extent that appellant claims total disability from February to November 1992, it is his burden of proof to establish the additional four hours per day.[6] Since the Board directed the Office to further develop the medical evidence in the prior Board decision, the issue will not be addressed on this appeal.

With respect to disability for work from February to November 1992, an attending physician, Dr. Howard H. Galarneau, Jr., an osteopath, opined in a May 23, 1993 report, that appellant "was permanently disabled from his visit of February 28, 1992 through the time of his treatment here." Dr. Galarneau does not clearly explain this statement. He noted that appellant complained of pain and numbness on February 28, 1992, but he does not explain how the employment injury had changed such that appellant could not continue to work four hours per day as of February 1992.

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[2] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[3] *Id.*

[4] Appellant did return to work on November 18, 1992 at six hours per day.

[5] 5 U.S.C. § 8115(a).

[6] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

Another attending physician, Dr. Joe G. Gonzales, a specialist in physician medicine, stated in a report dated February 20, 1992, that he had previously released appellant to work six hours per day and he continued to believe this was appropriate, noting the lack of significant objective findings. Moreover, a second opinion referral physician, Dr. Paul S. Saenz, an osteopath, reviewed the medical evidence and opined, in a January 5, 1998 report, that appellant could have performed the supply clerk position on either a full- or part-time basis as of February 1992. The Board finds that the weight of the evidence is not sufficient to meet appellant's burden to establish an additional four hours of compensation from February to November 1992.

The Board further finds that, with respect to the claimed emotional condition, the case is not in posture for decision as a conflict in the evidence remains unresolved.

The Office found that a conflict existed on the issue of whether appellant had an emotional condition causally related to the November 15, 1988 employment injury. Dr. Rolando Rodriguez, a psychiatrist, had opined in a report dated August 31, 1995 that appellant had a psychiatric condition causally related to the employment injury; Dr. Bruce Smoller, a psychiatrist and second opinion referral physician, opined in a November 7, 1995 report, that appellant did not have an employment-related emotional condition.

Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[7]

The Office purported to resolve the conflict by referral to Dr. Maggie Marrero, a psychologist. The Office's procedures are quite specific with respect to conflicts in emotional condition claims: If the conflict is between two psychiatrists, the conflict must be resolved by referral to a Board-certified psychiatrist.[8] Only if the conflict is between a psychologist and a physician who does not specialize in treatment of mental disorders, is referral to a psychologist appropriate.[9] In this case the conflict was between two psychiatrists and, therefore, the case will be remanded to the Office for referral to a Board-certified psychiatrist to properly resolve the conflict.

The Board further finds that the Office acted within its discretion in denying authorization for back surgery.

Section 8103(a) of the Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief,

[7] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[8] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(2) (March 1994). This section notes that this practice will ensure that the referee physician carries sufficient weight in cases where a medical doctor has been involved and should also ensure that the full range of issues is discussed.

[9] *Id.*

reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[10] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal.

The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[11]

In a report dated April 8, 1994, Dr. Bernie L. McCaskill, an orthopedic surgeon and second opinion referral physician, reviewed the medical evidence and opined that there were no findings to justify the proposed back surgery. Dr. Saenz stated, in a March 25, 1998 report, that he did not believe a proposed lumbar interbody fusion was a reasonable treatment for appellant. The record does not contain a reasoned opinion on causal relationship between any proposed back surgery and the employment injury; the weight of the evidence indicates that surgery was not appropriate. Accordingly, the Board finds that the Office did not abuse its discretion in this case.

[10] 5 U.S.C. § 8103(a).

[11] *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

The decisions of the Office of Workers' Compensation Programs dated October 8 and April 2, 1998 are affirmed with respect to authorization for back surgery, reversed with respect to modification of the February 11, 1992 wage-earning capacity determination and modified to reflect that appellant has not established entitlement to an additional four hours of compensation per day from February to November 1992. With respect to a claim for an emotional condition, the October 8, 1998 decision is set aside and the case is remanded to resolve the conflict in the medical opinion evidence.

Dated, Washington, DC
February 20, 2001

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member