U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CARROLL R. SMITH, JR. and U.S. POSTAL SERVICE, POST OFFICE, Shreveport, LA

Docket No. 01-288; Submitted on the Record;
Issued January 24, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly calculated the amount of appellant's compensation based only on his federal employment, excluding concurrent, private sector employment; (2) whether the Office properly determined that the position of Cashier II represented appellant's wage-earning capacity effective December 14, 1998; and (3) whether the Office abused its discretion by denying appellant's March 15, 2000 request for reconsideration.

On October 2, 1993 appellant, then a 43-year-old part-time rural letter carrier, sustained multiple contusions, fractures of his right hip and heel and a broken nose when his postal vehicle was struck by an oncoming car. On October 9, 1993 appellant underwent open reduction and internal fixation of both fractures. The Office subsequently accepted an adjustment reaction resulting from the October 2, 1993 accident.[1] He stopped work on October 2, 1993 and did not return.[2] Appellant received continuation of pay, followed by compensation on the daily rolls.

On appellant's claim form, postmaster John Locke stated that at the time of the October 2, 1993 accident, appellant was employed as a Saturday only carrier, with a 7:00 a.m. to 2:10 p.m. tour of duty. In a February 20, 1996 affidavit of earnings and employment (Form EN-1032), appellant stated that prior to and at the time of the October 2, 1993 accident, he received income and benefits from a family bedding and furniture business.

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[1] The record contains a March 1994 Social Security decision denying disability insurance benefits and a May 10, 1994 determination by a state social services agency that appellant was "severely disabled" and, therefore, eligible for vocational rehabilitation services. The determinations of other administrative or state agencies are not binding on the Board. *See Daniel Deparini*, 44 ECAB 657 (1993).

[2] Appellant submitted affidavits of earnings and employment (Form EN-1032) dated February 20, 1996, August 23, 1997 and December 9, 1998, stating that he had not been employed during the 15-month period preceding the date of the forms.

Dr. Gordon Mead, an attending Board-certified orthopedic surgeon, submitted progress notes through February 1995 finding that appellant's injuries continued to disable him for work. In a March 13, 1995 report, Dr. Mead noted that appellant had pain and still walked with crutches. He found appellant unimproved and totally disabled for work in reports from June 9, 1995 to March 25, 1997.

On April 25, 1995 the Office asked Dr. Robert Holladay, a Board-certified orthopedic surgeon, to provide a second opinion on whether appellant continued to be totally disabled due to the accepted injuries. Dr. Holladay provided a May 15, 1995 report diagnosing status-post surgical reduction of right hip and heel fractures, traumatic arthritis of the right hip and subtalar arthritis of the right foot and heel. He opined that appellant was capable of working two to three hours a day in a sedentary, limited-duty position.[3]

In an August 17, 1995 report, Dr. Paul D. Ware, an attending psychiatrist, diagnosed major depressive disorder related the accepted injuries and subsequent physical disability. Dr. Ware prescribed medication and continued counseling.[4]

In a July 5, 1996 memorandum to the file, the Office found a conflict of medical opinion between Drs. Mead and Holladay on appellant's ability to work. To resolve this conflict, the Office referred appellant to Dr. J. Lee Etheredge, a Board-certified orthopedic surgeon, selected as the impartial medical examiner.

In an August 14, 1996 report, Dr. Etheredge provided a history of injury and treatment, found a satisfactory range of right hip motion with pain, atrophy of the right quadriceps and calf, weakness of the right knee, decreased right ankle motion with instability, decreased right ankle jerk reflexes and some decreased sensation in the right foot. Dr. Etheredge diagnosed degenerative lumbar disc disease with a superimposed sprain and noted "[f]racture dislocation, right hip, status post open reduction and internal fixation with some probable sciatic nerve contusion. [And] mild residual weakness of the right lower leg with status post reduction and internal fixation of a right calcaneus fracture with moderate subtalar arthritic changes and "some mild to moderate subluxation of the peroneal tendons of the right ankle." He stated that appellant could perform sedentary work with frequent position changes, no more than six hours a day of sitting, no repetitive bending, pushing, pulling, prolonged standing, climbing, squatting, kneeling or crawling and lifting less than 10 pounds frequently.

In a June 5, 1997 closure report,[5] a rehabilitation specialist found appellant vocationally qualified for and medically able to perform the duties of a Cashier II.[6] The position required

[3] In a May 17, 1995 report, Dr. Carl Goodman, an attending Board-certified orthopedic surgeon, noted that appellant is "in obvious distress from right leg pain," and could not "put full weight on the right leg." Dr. Goodman diagnosed degenerative disc disease at L5 without nerve root compression or irritation and "[r]ight leg pain" secondary to postoperative status.

[4] In reports from April 4 to August 8, 1996, Dr. Ware noted that appellant's depression had improved with medication and counseling and recommended continued psychotherapy and vocational rehabilitation.

[5] In August 1995, the employing establishment stated that it was unable to offer appellant any position within the restrictions imposed by Dr. Holladay. The Office provided vocational rehabilitation services from November 1995 to June 1997. In February 21, 1996 notes, Dr. Mead approved position descriptions for the sedentary position of

occasional lifting up to 20 pounds, frequent lifting or carrying of up to 10 pounds, no climbing, balancing, stooping, kneeling, crawling or crouching. The counselor noted that according to a recent state labor market survey, the Cashier II position was readily available in appellant's commuting area, with entry level wages of $5.00 an hour, or $206.00 a week.

In a September 4, 1997 report, Dr. Mead stated that appellant was still unable to be gainfully employed because he could not stand, sit or walk for any prolonged period of time. He used crutches when up and moving around.

In an April 27, 1998 report, Dr. Mead stated that appellant was "doing about the same," with no "particular deterioration."

By notice dated November 5, 1998, the Office advised appellant that it proposed to reduce his wage-loss benefits because the medical evidence established that he had the capacity to earn wages as a Cashier II. Appellant was afforded 30 days in which to submit factual or medical evidence indicating that he could not perform the duties of the proposed position.

He did not respond.

By decision dated December 14, 1998, the Office reduced appellant's wage-loss compensation to zero on the grounds that the medical evidence demonstrated that he was able to perform the position duties of a Cashier II. The Office found that appellant had not submitted factual or medical arguments contesting the reduction of compensation. The Office noted that appellant's weekly pay rate when injured was $99.28, with a current pay rate of $130.72 a week and an adjusted earning capacity in the selected position of $156.86. As appellant's adjusted earning capacity was more than his current pay rate, the Office found that he had no loss of wage-earning capacity.

On January 4, 1999 appellant requested reconsideration and submitted additional medical evidence.

In a November 13, 1998 report, Dr. Mead noted that appellant was "the same," and remained unable to work at any type of job which required standing, walking or sitting. He advised appellant would have to get up and move around periodically.

In an October 13, 1998 report, Dr. Susan V. Williams, an attending rheumatologist, diagnosed probable fibromyalgia, "[m]ild generalized OA [osteoarthritis] notably in the lumbar spine, cervical spine, fingers, as well as post-traumatic OA in the ankles and right hip," and depression.[7]

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office manager and programmer-analyst.

[6] U.S. Department of Labor, *Dictionary of Occupational Titles*, No. 211-462-010.

[7] Dr. Williams obtained x-rays on October 13, 1998 showing mild degenerative changes at L5-S1.

In a November 11, 1998 report, Dr. Williams stated that appellant could not perform the duties of the Cashier II position because he was unable to sit on a stool or stand. Dr. Williams opined that "the combination of his disorders renders him totally and completely disabled."

By decision dated February 22, 1999, the Office denied appellant's request on the grounds that the evidence submitted was insufficient to warrant modification of its prior decision. The Office noted that Drs. Mead and Williams did not provide sufficient medical opinion to establish that appellant could not perform the selected job and that the weight of the medical evidence continued to rest with Dr. Etheredge.

Appellant requested reconsideration on February 3, 2000 and asserted that at the time of the accident, he was concurrently employed full time as a truck driver for his family's furniture store and worked at the employing establishment only on Saturdays. Appellant contended that the Office's wage-earning capacity determination was wrong because it did not take into account his earnings as a truck driver.[8]

By decision dated February 11, 2000, the Office denied modification of the February 22, 1999 decision. The Office found that appellant did not provide evidence substantiating his private sector employment or his disability from resuming his job as a truck driver. The Office also found no evidence substantiating that appellant was hired to work only as a Saturday rural carrier and not as a full-time employee.

On March 15, 2000 appellant again requested reconsideration, but did not submit any evidence or make any new legal argument.

By decision dated March 28, 2000, the Office denied appellant's request for reconsideration finding that his request was insufficient to warrant a merit review of the case as it did not raise any substantive legal questions or include new and relevant evidence.

The Board finds that the case is not in posture for decision on the issue of calculating appellant's compensation.

Under the principles of *Irwin E. Goldman*,[9] if a part-time federal employee was concurrently employed full time in private business when injured or when disability began, he had the capacity to earn wages as a full-time federal employee. Appellant's pay rate for compensation purposes should be that of the federal position and any similar employment he was holding at the time of injury.[10]

In this case, the record establishes that at the time of the October 2, 1993 accident, appellant was employed as a "Saturday only" carrier. In a February 20, 1996 affidavit of

[8] Appellant also asserted that the Office did not take into account appellant's nonwork-related conditions of depression, fibromyalgia and testicular cancer in determining whether he could perform a Cashier II's duties, or appellant's possible entitlement to a schedule award.

[9] 23 ECAB 6 (1971).

[10] *Steven J. Rose*, 44 ECAB 211 (1992); *James Jones, Jr.*, 39 ECAB 678 (1988).

earnings and employment, appellant advised that, at the time of the October 2, 1993 accident, he received income and benefits from a family bedding and furniture business. In a February 3, 2000 memorandum, appellant elaborated that at the time of the accident, he was concurrently employed full time as a truck driver for his family's furniture store and was employed as a letter carrier at the employing establishment only on Saturdays.

However, in its February 11, 2000 decision, the Office found no evidence substantiated either that appellant was employed as a letter carrier only one day a week, or that he had concurrent private sector employment at the time of the accident. The Board finds that there is evidence of record to support both contentions. Because the Office failed to undertake any development to ascertain the amount of these earnings, or consider them in determining appellant's loss of wage-earning capacity, the case will be remanded to the Office.

On remand, the Office must conduct further development regarding whether driving the furniture delivery truck was sufficiently similar to driving a postal vehicle to constitute similar employment under *Goldman*. The Office shall obtain a detailed description of the physical requirements of the furniture delivery job, whether appellant was required to load and unload the truck, the approximate weight of any furniture he handled and the frequency of any lifting and bending. Also, the Office shall determine the amount of appellant's earnings and benefits as a truck driver for the family furniture and bedding business as of October 2, 1993. The Office shall then recalculate appellant's loss of wage-earning capacity to include his private sector employment as a full-time truck driver. Following this development, the Office shall issue an appropriate decision in the case.

The Board finds that the Office properly determined that appellant was medically capable of performing the duties of the selected position of Cashier II.[11]

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[12]

Under section 8115(a) of the 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. 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.[13] Accordingly, the evidence must establish that jobs in the position selected for determining wage-earning capacity

[11] Although appellant's wage-loss compensation benefits is not in posture for decision, the Office's medical determination of his ability to perform the selected Cashier II position is independent of its financial calculations.

[12] *Bettye F. Wade*, 37 ECAB 556 (1986); *Harold S. McGough*, 36 ECAB 332 (1984).

[13] *See generally*, 5 U.S.C. § 8115(a); A. Larson *The Law of Workers' Compensation* § 57.22 (1989); *see also Bettye F. Wade*, *supra* note 12.

are reasonably available in the general labor market in the commuting area, in which the employee lives.[14]

When the Office makes a medical determination of partial disability and specific work restrictions, it may refer the employee's case to an authorized vocational rehabilitation counselor for rehabilitation services and to identify a position fitting the employee's capabilities. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.[15] In circumstances where rehabilitation efforts do not succeed, Office procedures instruct the rehabilitation officer to submit a final report containing relevant information enabling the Office to perform a constructed wage-earning capacity determination,[16] which may be based on a position deemed suitable but not actually held.[17]

In this case, the Office obtained an August 14, 1996 impartial medical report from Dr. Etheredge, a Board-certified orthopedic surgeon. He found appellant capable of full-time, sedentary work, with the ability to change positions frequently. Dr. Etheredge's opinion was based on the complete medical record, a statement of accepted facts and a thorough orthopedic examination. The Board finds that Dr. Etheredge's report is sufficiently complete and well rationalized to represent the weight of the medical evidence in this case.[18]

The Board notes that following Dr. Etheredge's report, appellant submitted October 13 and November 11, 1998 reports from Dr. Williams, an attending rheumatologist, who diagnosed a variety of conditions attributable to the accepted injuries and found appellant totally disabled for all work, including the Cashier II position. However, she did not submit sufficient rationale explaining how and why appellant continued to be disabled for work, or that his condition had worsened following Dr. Etheredge's assessment. Also, Dr. Williams' reports were not based upon the complete medical record or statement of accepted facts. Therefore, her opinion is not of sufficient weight to create a conflict with Dr. Etheredge's opinion.

Additionally, appellant received vocational rehabilitation services from November 1995 through June 1997. In a June 5, 1997 closure report, the vocational rehabilitation counselor identified the Cashier II position as appropriate for appellant's partially disabled condition and

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[14] *See Richard Alexander*, 48 ECAB 432 (1997); *Albert L. Poe*, 37 ECAB 684 (1986).

[15] *Steven M. Gourley*, 39 ECAB 413 (1988); *William H. Goff*, 35 ECAB 581 (1984).

[16] *Samuel J. Chavez*, 44 ECAB 431 (1993); Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Reemployment: *Vocational Rehabilitation Services*, Chapter 2.813.11 (November 1996).

[17] Federal (FECA) Procedure Manual, Part 2 -- *Claims*, Reemployment: *Vocational Rehabilitation Services*, Chapter 2.814.8 (November 2000).

[18] *Lucrecia M. Nielsen*, 42 ECAB 583 (1991). The Board notes that Dr. Etheredge's report is dated August 14, 1996, while the decision reducing appellant's compensation was not issued until December 14, 1998, more than two years later. However, Dr. Mead submitted September 4, 1997 and April 27, 1998 reports stating that appellant's condition was unchanged. Thus, appellant's own physician found that her condition was not significantly different from the time Dr. Etheredge submitted his report in August 1996 until at least April 27, 1998. Therefore, the Board finds that Dr. Etheredge's report remains sufficient to represent the weight of the medical evidence.

vocational skills and verified the position was being performed in sufficient numbers within appellant's commuting area so as to support the conclusion that it was reasonably available.

Appellant was advised on November 5, 1998 of the Office's intention to reduce his wage-loss compensation to zero, based on his ability to perform the selected position of Cashier II. Appellant did not respond within the 30 days allotted. The Office finalized the notice by decision dated December 14, 1998.

The Board finds that the Office has established that appellant was medically capable of performing the constructed position of Cashier II as such position was within appellant's medical restrictions, commensurate with his vocational and educational qualifications and was reasonably available within appellant's commuting area as verified by a state labor market survey which identified numerous Cashier II positions currently being performed in his area.

The Board finds that the Office properly denied appellant's request for reconsideration on its merits.[19]

Under section 8128(a) of the Act,[20] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[21] which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, set forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office; or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by the [Office]."[22]

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.[23]

In this case, the only evidence appellant submitted in support of his March 15, 2000 request for reconsideration was the March 15, 2000 letter itself. This letter did not demonstrate that the Office erroneously applied or interpreted a point of law, advance a new, relevant legal

[19] *See* 20 C.F.R. §10.606(b)(2) (i-iii).

[20] 5 U.S.C. § 8128(a).

[21] 20 C.F.R. § 10.606(b) (1999).

[22] 20 C.F.R. § 10.606(b).

[23] 20 C.F.R. § 10.608(b).

argument, or contain new, relevant evidence. Therefore, the Office's March 28, 2000 decision denying appellant's request for reconsideration was proper.

The decision of the Office of Workers' Compensation Programs dated March 28, 2000 is hereby affirmed. The decision dated February 11, 2000 is affirmed in part regarding the medical determination of appellant's wage-earning capacity. The February 11, 2000 decision is set aside and the case is remanded to the Office for further action consistent with this opinion.

Dated, Washington, DC
January 24, 2002

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member